1998

# Managing Legal Change: The Transformation of Establishment Clause Law

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# MANAGING LEGAL CHANGE: THE TRANSFORMATION OF ESTABLISHMENT CLAUSE LAW

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*One perspective on the Supreme Court is to see it as a manager of legal change. At a particular time, and with respect to a particular issue of federal law, a majority of Justices may coalesce around a law-transforming project. Because the Court enjoys nearly complete control over its docket, such a coalition of Justices may select carefully the cases most advantageous to the law-transforming project. And because the Court's pronouncements on matters of federal law are binding on all other interpreters, the Court may enforce its legal transformation by exercising its disciplinary powers of review. The Court's implementation of such law-changing projects is subject to a number of constraints, including the case-or-controversy limitation, the strategies of litigants, resistance by those the change would affect, disagreements among the change-favoring Justices, procedural rules, and informal norms such as stare decisis and the requirement of reasoned explanation. One way of evaluating the Court's work—besides substantive criticism of the rules or principles the Court ultimately adopts—is to examine how successfully the Court has pursued its law-transforming project, and in particular, how successfully it has negotiated the constraints that define the Court's power to manage legal change.*

*The law-transforming project examined in this Article is the Court's recent revision of Establishment Clause doctrine, particularly in the context of government aid to religious education. For a number of years, a majority of Justices were on record as opposing what had been the governing Establishment Clause standard—the* Lemon *test—on the grounds that it was insufficiently constraining on judicial interpretation and excessively restrictive on government aid to religion. But the change-favoring Justices could not obtain a majority for any* Lemon*-replacing standard. Finally, in its 1997* Agostini v. Felton *decision, the Court moved toward clarifying Establishment Clause doctrine and transforming the principles set out in* Lemon.

*In this Article, Hugh Baxter argues that the Court made a serious error in choosing* Agostini *as the vehicle for its transformation of Establishment Clause doctrine. The prime difficulty was* Agostini*'s procedural context which, as the*

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*Article explains, prevented the Court from acknowledging that its decision was changing the law. As a result, the Court could argue only that pre-*Agostini *precedent* already *had changed the law; the Court could not present new arguments, not yet sanctified by precedent, for transforming Establishment Clause doctrine. The Court's reading of pre-*Agostini *precedent is mistaken, and more important, the Court did not—and because of the procedural context* could not*—develop the sort of reasoned explanation one would expect from a decision to overrule the Court's precedents and change the law. Further, because* Agostini *denies lower courts the power to recognize what the Court itself professes to recognize—that the law already has been transformed, and Supreme Court precedents already have been abandoned—the Court finds itself ensnared in the paradox of reversing a lower-court decision it acknowledges was correct. Escaping this paradox would have required the Court to recognize a more active role for lower courts in the process of managing legal change. This Article maintains that, besides extricating the Court from paradox, recognizing a more active role for lower courts would have been independently desirable.* Agostini's *irony, the Article concludes, is that it combines an insistence on the Court's exclusive prerogative to manage legal change with an alarmingly poor exercise of that very prerogative.*

## I. THE SUPREME COURT AS MANAGER OF LEGAL CHANGE

One way to understand the role of the Supreme Court of the United States is to see it as a manager of legal change. The Court stands at the apex of the federal judicial hierarchy, and through the doctrine of hierarchical precedent,[1] the Court's pronouncements on matters of federal law are binding on all courts. Because the Court fills its docket almost entirely at its own discretion, a self-conscious majority of Justices can pursue a project of transforming an existing body of federal law by selecting the case or cases strategically most advantageous to that project. The Court then can exercise its disciplinary powers of review to ensure that its interpretation holds sway. Both of these aspects of the Court's power—its ability to pursue coherent law-reform strategies when a majority coalesces around a particular issue, and its ability to enforce those strategies by disciplining other legal interpreters—are what I mean by the Supreme Court's power to manage legal change.

This power, of course, has limits. Given the Court's scarce resources and limited opportunities for review, other courts can blunt or delay the Supreme Court's law-reform projects with their own strategies of evasion or circumvention.[2] Other governmental agencies, as well as persons subject to the law, also may be able to evade or circumvent the Court's requirements.[3] Losing litigants may choose not to seek the Court's review, thus diminishing the occasions upon which the Court will have an opportunity to issue law-changing decisions, and Congress can overturn the Court's law-changing statutory decisions by legislative enactment.[4] Finally, the Court's

1. For an investigation into the rationales for hierarchical precedent, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

2. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987) ("[T]he Court's awareness [of] how infrequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law."); *cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 75 (1994) (referring to the "neglected point" that "the Supreme Court presides over the entire federal court system and depends on lower courts to carry out any agenda the Court might have").

3. *Cf.* Strauss, *supra* note 2, at 1095 (noting the "management dilemmas" the Court faces in controlling lower courts and agencies).

4. For an excellent study of the dynamics of congressional overriding of the Court's statutory decisions, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

law-reform efforts do not always have social effect, or at least not the social effect the Court would like them to have.[5]

The Justices' power to pursue law-transforming projects is subject to an additional set of constraints: the various rules and norms that govern the Court's own decision-making processes. The Constitution, for example, imposes the case-or-controversy requirement and jurisdictional limits. Statutes and procedural rules, including the Court's self-prescribed rules, additionally limit the Court's ability to pursue law-changing strategies in particular cases. While there is no formal legal procedure for enforcing these requirements against the Court,[6] the Court nonetheless regularly treats them as constraints.

The Justices are further constrained—although again, not in a way officially enforceable against the Court—by informal norms governing the Court's operation. One such norm is stare decisis. While as the Court has said repeatedly, "'*[s]tare decisis* is not an inexorable command,'"[7] and while the Court on occasion overrules its own decisions, still, stare decisis limits—or at least influences—the Court's transformation of the law.[8] In some cases when the Court's inclination toward legal change is weak, stare decisis likely prevents the Court from overruling. And even when the impulse to change is stronger, overruling has costs for the prevailing majority—perhaps impaired relations with fellow Justices who would have adhered to the precedent,[9] the sting of a dissenting opinion, professional criticism, and sometimes public disapproval.[10] While these costs will not always deter the majority from executing its law-transforming project, at a minimum they affect the way in which the majority manages its transformation.

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5. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

6. While impeachment proceedings are theoretically available, they are practically unimaginable except in the most extreme instances of judicial disobedience.

7. Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

8. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 111–12 (1997) (noting that stare decisis "plays a large, recognized role in shaping the Court's agenda"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 745, 747–48, 750–51 (1988) (describing stare decisis as "agenda limiting").

9. *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 122 (1991) ("[T]he more areas in which a Justice routinely dissents or deviates from precedents, the less influence she has on the Court and the more likely she becomes a marginalist.").

10. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 971–74, 993–94 (1995) (analyzing the role of professional norms, collegial norms, and professional criticism as constraints on judicial behavior).

Stare decisis is related to a second informal norm that governs the Court's exercise of its law-changing power. Even in ordinary cases, the Court is expected to provide reasoned explanations for its decisions.[11] This expectation increases with a decision to change the law, and particularly with a decision to overrule one of the Court's precedents.[12] At least occasionally, this requirement might deter an overruling or other change in the law.[13] In other cases, it leads the Court to take special care in constructing a plausible justification. Even if not formally enforceable against the Court, the requirement of reasoned explanation, like the norm of stare decisis, channels the course of the Court's law-transforming strategies.

Finally, the norms governing the Court's decision-making processes impose one additional and important constraint: the need for five Justices to reach agreement on the law-changing standard. This requirement may operate as a brake on legal change. In some instances, the required five Justices may agree on the need for change, and agree even on the general direction of change, yet disagree as to the particular standard that should govern. This difficulty may thwart the change altogether, and at a minimum, it will affect significantly the course and extent of the transformation. The most moderate change-favoring Justices may well be in a position to limit the extent of legal change. The lack of particular agreement may produce either a splintered Court—changing prior law, but without a majority behind any particular standard—or a compromise outcome that no single Justice would have preferred. In my references to the law-changing strategy of "the Court," or a "majority" of the Court's Justices, I mean to include the possibility that particular disagreements among the change-favoring Justices will complicate any attempt to manage a change in the law.[14]

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11. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143–50 (William Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958); *cf.* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (exploring the functions and justifications for reason giving).

12. *See* Monaghan, *supra* note 8, at 757–58 (arguing that in constitutional adjudication something more than disagreement with the precedent's conclusion should be required for overruling); *see also* Gerhardt, *supra* note 9, at 141–43 (supporting Monaghan's position and arguing for full explanation of the grounds of overruling).

13. *See* Gerhardt, *supra* note 9, at 143.

14. I recognize that my references to "the Court" as actor, or even "a majority of the Court" as actor, will strike some readers as bizarre personifications. The Supreme Court, after all, is an institution that operates through the (largely) independent judgment of its personnel, and the institution's personnel changes over time. I retain the conventional usage for two reasons. First, the idea of "the Court" structures the discourse that bears the Supreme Court's name: the various writings the Justices issue in the course of rendering decision either are written "for the Court," or if not, are correspondingly limited in their power. This basic institutional fact affects both the way in which the Justices operate and the legal effects of their writings. Second, in some instances a majority of Justices may agree even on the particulars of a possible legal change, and in that event,

All of the above constraints on the Court's law-changing projects—resistance from other interpreters, actors, or litigants; legislative correction of statutory decisions; the slippage between legal decision and social effect; and the various rules and norms governing the Court's own decision making—do not just circumscribe or limit the Court's power to manage legal change. In an important sense, they *define* that power.[15] These constraints are the conditions under which the Court exercises its power to manage legal change. And the Court exercises its power most effectively when the Justices take these conditions self-consciously into account.

At any particular time in the Court's history, one could discern a number of law-changing projects in the making. Certainly this is true of the Court's recent history. For example, a majority of Justices on the Warren Court, with greater and lesser degrees of enthusiasm and self-conscious desire for change, pursued reform strategies in criminal procedure[16] and habeas corpus.[17] The gradual expansion of the right to privacy, from *Griswold*[18] to *Roe*[19] and beyond, straddled the Warren and Burger Court periods.[20] With respect to sex discrimination, a plurality of four Justices on

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to the extent they cooperate effectively, they can act for the Court in selecting and deciding law-changing cases. The idea of "the Court" may be a legal construction, produced and maintained by the very legal communications it structures, but nonetheless—or rather, for that very reason—legal theory cannot simply "unmask" it as mere fiction. Fiction it may be, with respect to some other discourse, but it is hardly a fiction without legal significance or effects.

15. I include the qualification "in an important sense" because, in another sense, the Court has the power (i.e., the ability) to violate all of the constraints I described as governing the Court's decision-making process. We can imagine the Court issuing advisory opinions apart from anything resembling a live case or controversy, dispensing entirely with stare decisis, rendering decisions on the merits with one-word orders, and the like. When I say these constraints define the Court's power, I mean that they describe the set of social expectations about how the Court will operate.

16. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). *But see* Terry v. Ohio, 392 U.S. 1 (1968).

17. *See* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

18. Griswold v. Connecticut, 381 U.S. 479 (1965).

19. Roe v. Wade, 410 U.S. 113 (1973).

20. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Servs., 431 U.S. 678 (1977); Moore v. City of E. Cleveland, 431 U.S. 494 (1977); *Roe*, 410 U.S. at 113; Eisenstadt v. Baird, 405 U.S. 438 (1972); *Griswold*, 381 U.S. at 479. The story here is of course complicated. The due process right of privacy vied, for a time, with a Ninth Amendment theory to similar effect. *See Roe*, 410 U.S. at 210–11 (Douglas, J., concurring) (invoking the Ninth Amendment as a textual warrant for the right of privacy); *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring, joined by Warren, C.J., and Brennan, J.) (relying on the Ninth Amendment rather than the Due Process Clause). Further, the change-favoring Justices in *Griswold* likely did not foresee specifically the later extension of their theories to (for example) abortion. In this transformation, and in others, both the choice of theory and the extent of the theory's application changed in the course of constitutional transformation. But surely it was clear

the Burger Court took as their project the adoption of strict scrutiny;[21] when that project stalled, a majority settled on the law-changing norm of intermediate scrutiny.[22] Members of the present Court certainly have a number of law-reform projects of their own—pursued through various coalitions, more or less coherently and systematically, and in varying stages of completion. Among those projects: limiting the scope and availability of habeas corpus relief,[23] restricting (though, it turns out, not abolishing) the constitutional right to abortion,[24] terminating long-running school desegregation plans and reducing the scope of federal court control over schools,[25] limiting (perhaps abolishing) affirmative action,[26] narrowing the

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even at the beginning that the Court had undertaken an important expansion of constitutional personal liberties, even if the future dimensions of that transformation were uncertain.

21. *See* Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973) (Brennan, J.) (plurality opinion).

22. *See* Craig v. Boren, 429 U.S. 190 (1976).

23. *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333 (1992); Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992) (overruling, in part, Townsend v. Sain, 372 U.S. 293 (1963)); Coleman v. Thompson, 501 U.S. 722 (1991); McCleskey v. Zant, 499 U.S. 467 (1991); Teague v. Lane, 489 U.S. 288 (1989). *Wright v. West*, 505 U.S. 277 (1992), offers an interesting perspective on the process I am describing. In *West*, three Justices, in Justice Thomas's opinion announcing the Court's judgment, made the case for a fundamental retrenchment in habeas corpus law, one that would have required federal habeas courts to defer to reasonable state-court determinations on all issues—although ultimately, perhaps for want of five votes, they concluded that the issue did not need to be decided in *West* itself. *See id.* at 285–95 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.). Justice O'Connor, however, who authored the Court's opinions in *Teague* and *Coleman*, did not want to go so far. Her opinion in *West* decisively repudiated the Thomas opinion's law-transforming ambitions. *See id.* at 297–306 (O'Connor, J., concurring in the judgment) (discussing, seriatim, what O'Connor characterized as eight errors in Thomas's opinion). Justice Kennedy, who had joined or authored all of the opinions cited at the beginning of this footnote, likewise resisted Thomas's implications. *See id.* at 306–10 (Kennedy, J., concurring in the judgment). Here, as elsewhere, the more moderate of the change-favoring Justices were able to control the extent of the transformation. *See also infra* notes 24, 26.

24. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); *cf.* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). In *Planned Parenthood*, as in the habeas corpus cases discussed in the preceding footnote, the Justices interested in the more moderate transformation were able to control. Justices O'Connor and Kennedy, both of whom had authored or joined opinions sharply criticizing *Roe*, were able to moderate *Roe*, rejecting its "rigid trimester framework" but without overruling (what they called) *Roe*'s "central holding." *Planned Parenthood*, 505 U.S. at 869–79 (joint opinion of Justices O'Connor, Kennedy, and Souter).

25. *See* Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. v. Dowell, 498 U.S. 237 (1991).

26. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (overruling Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The interposition of *Metro Broadcasting* between *Croson* and *Adarand* is a further illustration that the most moderate member of a law-changing coalition can control the reach of the law-transforming project. In *Metro Broadcasting*, Justice White—who had joined the Court's opinion in *Croson*, striking down a municipal affirmative action plan—cast a deciding vote to uphold a federal affirmative action plan. The event that led to *Metro Broadcasting*'s overruling in *Adarand*

use of race-based remedies under the Voting Rights Act,[27] placing constitutional controls on awards of punitive damages,[28] limiting the federal government's power vis-à-vis the states,[29] increasing the level of constitutional protections available to property owners under the Takings Clause,[30] and finally—the project I examine in this Article—transforming

was the replacement of Justice Marshall with Justice Thomas. Here, as elsewhere, the scope of a law-transforming project depended upon changes in the Court's personnel.

27. *See* Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). Although the Court's case-selecting discretion is limited in the Voting Rights Act context, where cases come to the Court on appeal rather than on writ of certiorari, the order in which the Court considered these cases was important for its strategy of lawtransformation. In *Shaw v. Reno*, the Court invalidated a plan that created two "majority-black" districts, placing emphasis on the districts' "bizarre" shape. *See* 509 U.S. 630, 635–36, 646–47, 658–59 (1993). The Court thus was able to consider, first, a case in which race seemed to have been the only significant factor in drawing district lines before addressing—and invalidating—a plan in which other objectives at least arguably competed with race. The Court explained in *Miller* that *Shaw v. Reno*'s emphasis on the districts' bizarre shape was only to underscore that the plan had violated more general principles. *See Miller*, 515 U.S. at 912–14.

28. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (invalidating a punitive damages award under a substantive due process theory); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (invalidating an award under a procedural due process theory); *cf.* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (upholding an award against substantive and procedural due process challenge); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (same); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (holding that the Excessive Fines Clause does not apply to punitive damages in civil cases). The punitive damages issue is an interesting one. As the above citations indicate, over a seven-year period the Court regularly took cases in which one federal constitutional limit or another was suggested, until finally, in *BMW* and *Honda*, the Court was able to find that a constitutional limitation had been violated. The Court's recurring attention to the issue illustrates that a coalition of Justices found "runaway" punitive-damages awards constitutionally troubling. *See Haslip*, 499 U.S. at 18 ("We note once again our concern about punitive damages that 'run wild.'"); *id.* at 9–12 (recounting statements by various Justices expressing constitutional concern over punitive damage procedures and awards). The special concern for this issue appears, further, in the fact that the issues in some of the cases were highly fact-specific. *See BMW*, 517 U.S. at 562–63 (describing the facts and stating that "[t]he question presented is whether [the award involved in the case] exceeds the constitutional limit"); *TXO*, 509 U.S. at 446 (describing the award and stating that "[t]he question we granted certiorari to decide is whether that punitive damages award violates the Due Process Clause of the Fourteenth Amendment"). Ordinarily, the Court does not take cases to decide only whether there has been a constitutional violation on the facts presented.

Further, at least on the facts, *BMW* was well selected to serve as the first case in which the Court found an award of punitive damages constitutionally excessive. The party who had received punitive damages was a physician whose harm was only a bad paint job on his BMW. Originally he had received $4 million in punitive damages (cut to $2 million by the state supreme court), though his compensatory damages amounted only to $4,000.

29. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992); *cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.").

30. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

Establishment Clause doctrine to lower the "wall of separation" earlier Courts had erected between church and state.

Two clarifications are necessary. First, I do not assume that the Justices' law-changing strategies take the form of explicit agreements, pacts, or contracts to change the law in particular directions. Instead, my sense and working assumption is that communication among Justices about Court matters ordinarily is minimal, outside of officially scheduled conferences and memoranda circulated generally among members of the Court. Nonetheless, on many issues a thoughtful Justice will have a strong sense of what his or her colleagues think the law should be. In such circumstances, Justices who agree with one another may be in a position to cooperate on a law-transforming project without express discussions of strategy and tactics, or any discussion beyond the official channels of Court communication. This Article does not depend upon any conspiracy theory of Court-managed change.

Second, by using the terms "management," "project," and "strategy," I do not mean to suggest that all of the Court's legal reforms are necessarily nefarious or illegitimate. A legal order without change is impossible, and resisting change is not inherently a social good.[31] This Article is not a hymn to abstract values of stare decisis. In my view, it is entirely proper for Justices of the Supreme Court to have, and to pursue self-consciously, visions of what the law should be. Rather than criticize the present Court, or past Courts, as "agenda-driven," the more pertinent lines of criticism for any particular reform strategy seem to me the following: Are the changes substantively desirable, and does the Court pursue those changes effectively and legitimately?

In this Article I do not follow the first line of criticism. The substantive merits of the Court's attempted transformation of Establishment Clause doctrine are well debated elsewhere.[32] Instead, my interest is in whether the

31. *Cf.* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 396 (1995) ("Readings of the Constitution change. . . . No theory that ignored these changes, or that presumed that constitutional interpretation could go on without these changes, could be a theory of our Constitution. Change is at its core.").

32. I will mention here only a few of the many contributions that defend a general approach to the Establishment Clause, selected to represent a range of views. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988) (defending the *Lemon* test, described *infra* notes 56–65 and accompanying text); Daniel O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865 (1993) (same); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1304–12 (1994) (defending, for cases involving "official prayers and publicly sponsored religious displays," an "anti-affiliation principle" that would bar government from affiliating itself with a particular religious sect or religion generally, but recommending different principles for other cases); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 68, 70 (1997) [hereinafter

Justices have pursued their law-transforming strategies in an effective and legitimate way. "Effective" and "legitimate," in this context, are partly distinct and partly overlapping. In asking whether the Justices' transformation is "effective," I mean to inquire whether they have selected an appropriate "vehicle" for their project (or projects) and whether they have employed that vehicle skillfully. Relevant here is the extent to which the change-favoring Justices have considered and negotiated any differences in their visions of what the law should be.[33] In asking whether the transformation is legitimate, I mean to investigate whether the Court has successfully negotiated the various constraints imposed by the rules and norms governing the Court's exercise of its decision-making power. When it overrules precedent, has the Court dealt adequately with stare decisis issues?[34] Has it

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Laycock, *Underlying Unity*] (advocating "substantive neutrality," or, "minimizing government influence over religious belief or disbelief, practice or nonpractice"); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DE PAUL L. REV. 993 (1990) [hereinafter Laycock, *Neutrality*] (same); Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2077–78 & nn. 71–72 (1992) (advocating invalidation of "use of the state apparatus to declare theological positions or otherwise infuse an overtly religious sensibility into public life," but defending, largely on equality grounds, voucher and tax-credit programs of aid to schools, including religious schools); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) (defending an equality theory and criticizing permissive accommodations of religion); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 550 (1986) (identifying, as an unconstitutional establishment, "a governmental action [that] symbolizes improper state endorsement of religion"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992) [hereinafter McConnell, *Religious Freedom*] (advocating a "pluralist" approach under which government action violates the Establishment Clause if its "purpose or probable effect [is] to increase religious uniformity . . . by forcing or inducing a contrary religious practice . . . without sufficient justification"); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) [hereinafter McConnell, *Coercion*] (emphasizing government coercion as the criterion of constitutionality); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989) (using economic theory to defend a notion of religious neutrality); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 825–61 (1993) (defending the coercion test, discussed *infra* notes 231–256 and accompanying text); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 205 (1992) (arguing that government may not "put its imprimatur of approval on religion through any official action" and may not fund religion).

33. In cases of disagreement among the Justices about the particulars of legal change, *see supra* note 14 and accompanying text, the criteria for effectiveness are difficult to determine. I assume, however, that if the disagreement had the effect of blocking *any* change, the attempted transformation would be (at that point) a failure. If the disagreement led to some change, but either without a majority endorsing a particular law-changing standard, or with a hopelessly incoherent replacing standard, the transformation would be at that point less than a success, though not entirely a failure. Criteria for success are difficult to specify in these circumstances; they depend upon a choice between or among the competing views of the change-favoring Justices.

34. For an account of the relation between stare decisis and court-managed legal change, see Monaghan, *supra* note 8, at 739–73.

provided a satisfactory explanation of its decision? Has it observed the procedural rules that condition the Court's law-changing power?

The story of the transformation of Establishment Clause doctrine begins with the Court's 1971 ruling in *Lemon v. Kurtzman*.[35] *Lemon* set out a three-part test for evaluating government aid to religious institutions. Under that test, to avoid invalidation a challenged program "must have a secular legislative purpose; [its] . . . primary effect must be one that neither advances nor inhibits religion," and the program and its administration "must not foster an 'excessive government entanglement with religion.'"[36]

As I recount in Part II.A of this Article, the Court for a time used the *Lemon* test aggressively to enforce a strict separation between church and state, particularly in cases involving government aid to religiously affiliated elementary and secondary schools.[37] The decisions from this period in which I am most interested include the Court's 1975 ruling in *Meek v. Pittenger*,[38] and its 1985 decisions in *School District v. Ball*[39] and *Aguilar v. Felton*.[40] The latter two decisions, invalidating programs that provided supplementary and remedial education programs in religious schools, mark the outer limit of the Burger Court's expansion of the Establishment Clause. They mark also the last occasion on which the Court invalidated an aid program under the *Lemon* test.

I discuss in Part II.B the Rehnquist Court's growing disenchantment with the *Lemon* test—both its form (or formlessness) and also the results reached under that test. Beginning around the time *Ball* and *Aguilar* were decided, various Justices began to develop new Establishment Clause theories that could displace the *Lemon* test. While they reached no consensus on a replacement test, a group of five Justices dissatisfied with *Lemon* seemed to have coalesced. These Justices, in three separate opinions filed in the 1994 *Board of Education of Kiryas Joel Village School District v. Grumet* case,[41] seemed to signal *Lemon*'s demise.[42] Even more clearly, they indicated

35. 403 U.S. 602 (1971).

36. *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

37. *See, e.g.*, Laycock, *Underlying Unity*, *supra* note 32, at 54–55 (noting that the strictest application of *Lemon* principles has been in cases involving aid to what the Court has called "pervasively sectarian" institutions, a term that "in practice . . . seems to be a synonym for [religiously affiliated] elementary and secondary education").

38. 421 U.S. 349 (1975).

39. 473 U.S. 373 (1985).

40. 473 U.S. 402 (1985).

41. 512 U.S. 687 (1994).

42. *See infra* Part II.C.

their desire to overrule *Aguilar* and *Ball*.[43] These Justices, constituting a majority of the Court, seemed to be inviting a petition that could serve as a vehicle for overruling *Aguilar* and *Ball* at a minimum, and likely for replacing the *Lemon* test as well.

For more than two years, the Court waited. Then, in January 1997, the Court granted certiorari in *Agostini v. Felton*[44]—the very same case as *Aguilar*, though newly recaptioned. In *Agostini*, the New York City Board of Education sought, under Rule 60(b)(5) of the Federal Rules of Civil Procedure,[45] to vacate the injunction imposed as a result of *Aguilar*. According to the Court's most recent interpretation of Rule 60(b)(5), the board had to show "a significant change . . . in law"[46] that justified relief from the *Aguilar* judgment. The lower courts found no such change in the law, reasoning that *Aguilar*, though clearly imperiled, had not yet been overruled and therefore was still binding precedent. While the Supreme Court agreed that the lower courts were correct to follow *Aguilar*, it held also that cases post-*Ball* and post-*Aguilar* had rendered those decisions "no longer good law."[47] Accordingly, the Court formally overruled *Aguilar* and significant portions of *Ball*. It did not, however, overrule *Lemon*. Instead, for reasons to be explained, the Court ended up, in effect, reaffirming a modified version of *Lemon* as "current law."[48]

I argue in Part IV of this Article that in deciding to pursue the transformation of Establishment Clause doctrine in *Agostini*, the change-favoring Justices made a spectacular misjudgment. In any other case, the Court would have been free to announce a revised, *Lemon*-displacing theory of the Establishment Clause, provide reasons sufficient to justify that new theory,

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43. *See Kiryas Joel*, 512 U.S. at 717–18 (O'Connor, J., concurring in part and concurring in the judgment); *see id.* at 730–32 (Kennedy, J., concurring in the judgment); *see id.* at 750 (Scalia, J., dissenting). The Chief Justice and Justice Thomas joined Justice Scalia's opinion.

44. 117 S. Ct. 759 (1997).

45. That rule provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.—
>
> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . [when[:
>
> . . . .
>
> (5) . . . it is no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time . . . .

FED. R. CIV. P. 60(b)(5).

46. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992).

47. Agostini v. Felton, 117 S. Ct. 1997, 2003, 2016 (1997).

48. *Id.* at 2012; *see also id.* at 2016 (referring to the "criteria we currently use to evaluate whether government aid has the effect of advancing religion"); *id.* at 2017 (referring to "our current understanding of the Establishment Clause").

and then overrule both *Ball* and *Aguilar* under the new post-*Lemon* test. Or, even if they could not agree on a post-*Lemon* test, the change-favoring Justices could have overruled *Ball* and *Aguilar* without adopting definitively a new post-*Lemon* test—reasoning that the result followed from any of the competing Establishment Clause theories those Justices preferred.

But neither of these law-changing strategies was genuinely available in *Agostini*. The reason was *Agostini*'s Rule 60(b)(5) procedural context. As the Court acknowledged, Rule 60(b)(5) prohibited the Court from changing the law in its *Agostini* decision. Instead, the Court had to locate the required "significant change in the law" in its own pre-*Agostini* precedents. As a result, *Agostini*'s reasoning consists entirely in a parsing of post-*Aguilar* precedent. But these precedents, I argue in Part IV.A, are not exactly fertile ground: They do not expressly criticize *Aguilar*, *Ball*, or *Lemon*,[49] and in fact, they fit themselves into the *Lemon* framework in which *Ball* and *Aguilar* operated. The Court's arguments that those precedents implicitly overruled *Ball* and *Aguilar*, then, are necessarily unconvincing. And notwithstanding the ambitions for change the five Justices expressed in *Kiryas Joel*, the Court could not legitimately develop a law-transforming Establishment Clause theory in *Agostini*.

I contend in Part IV.B that *Agostini*'s Rule 60(b)(5) context exacted further revenge, in the form of paradox. In *Agostini*, the Court was reviewing a district court judgment that refused relief, reasoning that only the Supreme Court could pronounce the not-yet-overruled *Aguilar* dead. The Court agreed that it alone has this power. But that made the judgment below legally correct, and the Court therefore had to contend with the paradox of reversing, as an abuse of discretion,[50] a correct lower-court judgment.

Something like this pattern appears in most overruling decisions, provided that the lower courts properly have followed the precedent the Court later overrules.[51] But in the standard case of overruling, the apparent paradox is easily dispelled: The Court's overruling decision changes the law, and so the lower courts' decisions, correct when rendered, are incorrect from the perspective of the new rule. Accordingly, in these cases the Court properly reverses, without paradox.

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49. The separate opinions in *Kiryas Joel* did criticize all three cases, but the Court determined in *Agostini* that *Kiryas Joel* could not count as a law-changing decision. *See infra* note 305 and accompanying text.

50. *See Agostini*, 117 S. Ct. at 2017–18 (acknowledging that "abuse of discretion" is the standard under which district court Rule 60(b) decisions are reviewed).

51. "Something like this pattern" because generally the standard will be de novo review. Still, when the Court overrules a governing precedent, the lower courts will be correct to have relied on it, and the Court nevertheless will reverse their judgments.

This escape strategy is unavailable to the Court in *Agostini*, again because of the case's procedural context. In order to grant relief under Rule 60(b)(5), the Court must insist that its *Agostini* decision does not change the law, but instead only recognizes post-*Aguilar* changes the Court had effected earlier. These changes, the Court says, were complete by 1993, four years before *Agostini*.[52] Thus the Court, in deciding *Agostini*, rules that *Aguilar* already is not good law. But the Court forbids the lower courts from recognizing this change in the law.[53] Until the Court has confirmed its transformation of Establishment Clause law by overruling *Aguilar* expressly, the Court maintains, the lower courts are bound by the *Aguilar* decision. In so maintaining, the Court is insisting that it, alone among courts, may legitimately manage the transformation of Establishment Clause law. The consequence of that insistence is incoherence in *Agostini*'s reasoning. Between 1993 and the Court's 1997 decision, the Court must suppose, "the law" doubles into two contradictory bodies of law, simultaneously valid—post-*Aguilar* law in the Supreme Court, and *Aguilar* itself in all other courts.

The Court, I argue, could have escaped this embarrassment if it had assigned other courts even a small part in the process of legal change. The Court need not have allowed lower courts themselves to change the law that the Supreme Court has announced. Rather, the Court could have escaped paradox by ceding a much more limited power: the power to follow the Supreme Court's commands faithfully by recognizing what the Court itself claims to recognize in *Agostini*—that the Court has already, though implicitly, changed the law. Instead, the Court treats the lower courts simply as objects of Supreme Court disciplinary authority.

*Agostini*, in short, represents a misuse of the Court's power to manage legal change.[54] The irony of *Agostini*—and what makes it, I think, a

52. The putatively law-changing decisions on which the Court relies are *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

53. The Court wrote:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." . . . The trial court . . . was . . . correct to recognize that the [Rule 60(b)(5)] motion had to be denied unless and until this Court reinterpreted the binding precedent [*Aguilar*].

*Agostini*, 117 S. Ct. at 2017 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

54. *Cf.* Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) ("Constitutional interpretation tolerates many paradoxes and rejects compulsive doctrinal neatness. Yet, if devotion to principled

profoundly unsettling decision—is that the Court insists that it alone can manage the legal change it envisions, and then proceeds to manage that transformation so alarmingly badly.

## II. THE *LEMON* FRAMEWORK AND THE PROLIFERATION OF ALTERNATIVE STANDARDS

Under the Court's path-marking decision in *Lemon*, if a challenged statute or government program is to avoid invalidation on Establishment Clause grounds, it "must have a secular legislative purpose . . . ; [its] primary effect must be one that neither advances nor inhibits religion; and [it] must not foster an excessive government entanglement with religion."[55] In a number of cases decided during *Lemon*'s 1971–85 heyday, the Court used the "effects" and "entanglement" parts of the *Lemon* test to invalidate government programs of aid to religious education. I discuss those cases and the various doctrinal categories and distinctions the Court developed in Part II.A below. I discuss also a second line of cases, decided between 1983 and 1993, in which the Court upheld programs that had the effect, at least in the particular case before the Court, of providing assistance to religious education. Until *Agostini*, these two lines of precedent coexisted more or less peacefully: The Court decided particular cases by placing them in one or the other line, based largely on the Court's characterization of the facts. But with changes in the Court's personnel, by the early 1990s a majority of the Justices had, at one time or another, expressed dissatisfaction with the *Lemon* test. I discuss this growing dissatisfaction, and the various *Lemon*-displacing tests that were suggested, in Part II.B.

This discussion of the *Lemon* framework, and of the Court's increasing distaste for that framework, serves as background for my account of *Agostini*'s transformation of Establishment Clause doctrine. *Agostini*, I argue in Part III, transforms the law by denying the distinction separating the two lines of *Lemon* precedent. Without this distinction to differentiate the two lines of cases and explain their differing outcomes, the school-aid cases are simply inconsistent in their outcomes. The Court, then, must choose between the two lines of precedent, and not surprisingly the Court chooses the line upholding government aid to religious education. What makes the Court's treatment of precedent illegitimate, I argue, is not so much the

adjudication is to be taken seriously, tolerance must have its bounds, doctrinal integrity must be more than a sometime goal.").

55. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal quotation marks omitted) (citations omitted).

substance of the Court's choice as its pretense that the choice already had been made before *Agostini*.

## A. School-Aid Cases Under *Lemon*

In *Lemon*, the Court considered a Pennsylvania program that reimbursed private schools, nearly all of them religiously affiliated,[56] for expenditures incurred in teaching secular subjects. In *Lemon*'s companion case, *Earley v. DiCenso*,[57] the Court evaluated a Rhode Island program that provided salary supplements to teachers in private schools, nearly all of which were religious schools.[58] The Court set out its three-part test of purpose, effect and entanglement, and found that both programs created an impermissible entanglement of government and religion.[59] Although the statutes authorizing both programs prohibited state expenditures on religious indoctrination, the Court held that to ensure that these limits were respected, "[a] comprehensive, discriminating, and continuing state surveillance [would] inevitably be required."[60] The surveillance would have to be "continuing," the Court said, because "[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion,"[61] and because religious-school teachers, working in a sectarian environment, face ongoing pressures to engage in religious indoctrination.[62] Monitoring religious-school instruction for religious content would "involve excessive and enduring entanglement between state and church."[63] Review of religious-school records to determine which expenditures were for religious instruction and which were for secular teaching involved similar state intrusion into religion.[64] Finally, the Court said, the potential for political divisiveness inherent in state financial assistance to religious schools creates a "broader base of entanglement."[65]

56. *See id.* at 610.
57. 403 U.S. 602 (1971).
58. *Lemon*, 403 U.S. at 607–08. I refer to both *Lemon* and *Earley* as "*Lemon*," as the Court's opinion does in its running headers.
59. *See id.* at 614. The Court found that both programs had the required secular purpose, *see id.* at 613, and it did not rule on whether the programs had an impermissible "primary effect," *see id.* at 613–14.
60. *Id.* at 619 (referring to the Rhode Island program); *see also id.* at 621 (referring to the Pennsylvania program).
61. *Id.* at 619.
62. *See id.* at 618–19.
63. *Id.* at 619.
64. *See id.* at 620 (discussing the Rhode Island program); *see also id.* at 621–22 (discussing the Pennsylvania program).
65. *Id.* at 622–24; *see also id.* at 623–24.

The Court's subsequent school-aid decisions developed and extended *Lemon*'s analysis. For present purposes, the key decision was the Court's 1975 ruling in *Meek v. Pittenger*,[66] which set out the basic effects and entanglement categories that the Court used until *Agostini*. The Court considered in *Meek* a program under which a state loaned secular textbooks to nonpublic school students, loaned various instructional materials and equipment to the schools themselves, and sent state-paid teachers and other professionals into nonpublic schools to provide on-premises "auxiliary" services that included remedial and advanced instruction, guidance counseling, and testing. The Court evaluated the two loan provisions under the effects part of the *Lemon* test and the auxiliary services under the entanglement part.

Under the effects test, the Court upheld the textbook-loan provision, on the authority of its pre-*Lemon* decision in *Board of Education v. Allen*,[67] but it invalidated the loan of instructional materials and equipment.[68] The Court explained its different treatment of the two loan provisions by distinguishing between permissible "indirect" and "incidental" aid to religious schools, on one hand, and impermissible "direct and substantial" aid, on the other. In upholding the textbook provision, the Court emphasized that the challenged program loaned secular, nonideological books directly to the students rather than to the religious schools.[69] Even if the schools received an indirect benefit from the textbook loans, "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution."[70] According to the Court, the textbook-loan program resembled other constitutionally permissible forms of aid to religious-school students, such as "bus transportation, school lunches, and public health facilities."[71]

The loan of instructional materials, on the other hand, was "massive aid" provided directly to the nonpublic schools, and as such the aid was "neither indirect nor incidental."[72] The Court acknowledged that under the challenged program the loaned instructional materials were to be secular rather than religious in character. Nevertheless, the Court emphasized, the "primary beneficiaries" of the loaned instructional materials were "religion-pervasive institutions" that provided "integrated secular and religious

66. 421 U.S. 349 (1975).
67. 392 U.S. 236 (1968).
68. *See Meek*, 421 U.S. at 359–62 (relying on *Allen*, 392 U.S. at 236).
69. *See id.* at 361.
70. *Id.* at 359; *see also id.* at 364–65 ("Indirect and incidental benefits to church-related schools . . . do not offend the constitutional prohibition against establishment of religion.").
71. *Id.* at 364.
72. *Id.* at 365.

education."[73] Because secular education and these schools' "'religious mission'" are "'inextricably intertwined,'"[74] the Court concluded, "direct" and "substantial" aid to these schools' "educational function" necessarily "results in the direct and substantial advancement of religious activity"[75]—in violation of the effects part of the *Lemon* test.

As both then-Justice Rehnquist and Justice Brennan observed in their partial dissents, *Meek*'s distinction between the two kinds of loan is difficult to maintain.[76] The loaned textbooks seem to serve the religious schools' "educational function" as surely as do the loaned instructional materials. The Court later acknowledged this point, describing *Meek*'s treatment of the textbook-loan provision as a "unique presumption" established in *Allen*, before the Court's adoption of the *Lemon* test. While the Court allowed that this "presumption" was in "tension" with *Meek*'s rationale, it held that *Allen* should be followed "as a matter of *stare decisis*,"[77] though *Allen*'s "presumption" should not be expanded.[78] Notwithstanding this stare decisis-driven quirk in its analysis, however, the Court's distinction between permissible "incidental and indirect" aid, on one hand, and "direct and substantial" aid to religious schools' educational function, on the other, became its central effects criterion. This test, with elaborations shortly to be explained, governed the effects issue until the Court repudiated the test in *Agostini*.

*Meek*'s other contribution to Establishment Clause doctrine concerned the entanglement test, under which the Court analyzed the program providing on-premises "auxiliary services" in religious schools. The Court focused particularly on the parts of the program providing remedial instruction, accelerated instruction, and guidance counseling. The lower court had upheld these parts of the program as permissible "incidental and indirect aid," on the ground that the instruction was secular and nonideological and only supplemented the schools' basic curricula. The lower court had emphasized also that the "good faith and professionalism of

73. *Id.* at 366.

74. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring)).

75. *Id.*

76. *See id.* at 388–91 (Rehnquist, J., concurring in part and dissenting in part); *id.* at 378–85 (Brennan, J., concurring in part and dissenting in part). For Rehnquist, the similarity between the two issues meant that both loan provisions were constitutional; for Brennan, the similarity meant that both were unconstitutional.

77. Wolman v. Walter, 433 U.S. 229, 251 n.18 (1977).

78. *Id.* ("When faced . . . with a choice between extension of the unique presumption [concerning textbook loans] and continued adherence to the principles announced in our subsequent cases, we choose the latter course.").

the secular teachers and counselors" were sufficient guarantee that the state would not fund sectarian religious instruction.[79]

*Meek* sidestepped the effects issue, refusing to decide whether "substantial state expenditures to enrich the curricula of church-related elementary and secondary schools" constitute forbidden direct and substantial aid to religious schools' educational function.[80] Instead, invoking *Lemon*, the Court held that the teachers' and counselors' professionalism did not adequately ensure that state officials would refrain from religious indoctrination. In the context of a pervasively sectarian school,[81] the Court had said in *Lemon*, "'[a] comprehensive, discriminating, and continuing state surveillance'" would be required for the government to be "'certain . . . that [state-]subsidized teachers do not inculcate religion.'"[82] And these very "prophylactic contacts," the Court said, again invoking *Lemon*, would "necessarily give rise to a constitutionally intolerable degree of entanglement between church and state."[83] The Court refused to distinguish in this regard between supplementary and basic instruction or between basic instruction and guidance counseling. Each context presented a constitutionally unacceptable danger of state-sponsored religious indoctrination; each context, therefore, would require impermissibly entangling state surveillance of religious schools.[84]

*Meek*'s entanglement analysis is the prime basis for the Court's subsequent decision in *Aguilar*, and later a target of the Court's *Aguilar*-overruling transformation of Establishment Clause doctrine in *Agostini*. *Meek*'s effects analysis had more systematic significance still. The distinction between

79. *Meek*, 421 U.S. at 369.

80. *Id.*

81. The Court described these schools as ones "in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Id.* at 371.

82. *Id.* at 369–70 (quoting Lemon v. Kurtzman, 403 U.S. 602, 618–19 (1971)).

83. *Id.* at 370.

84. The Court wrote:

> That [the challenged statute] authorizes state funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from [*Earley*] and [*Lemon*]. Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion ro separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.

*Id.* at 370–71 (citations omitted).

constitutionally impermissible "direct and substantial" aid to religious schools and permissible "indirect and incidental" aid is the distinction on which the Court developed the two lines of precedent I mentioned in introducing this part. In one line of cases, running from *Meek*, to *Wolman v. Walter*,[85] to *Ball* and *Aguilar*, the Court invalidated systematic aid programs as forbidden "direct and substantial" aid. In the other line, including the Court's decisions in *Mueller v. Allen*,[86] *Witters v. Washington Department of Services for the Blind*,[87] and *Zobrest v. Catalina Foothills School District*,[88] the Court upheld other programs by classifying them as "indirect and incidental" aid. The Court's law-transforming technique in *Agostini* will be to treat the second line of precedent as repudiating the first.

1. The *Wolman*, *Ball*, and *Aguilar* Line

a. *Wolman*

*Wolman*, decided two years after *Meek*, followed *Meek*'s rationale in determining the constitutionality of various forms of aid provided, under a state statute, to religious education. As in *Meek*, the Court upheld, again on the strength of *Allen*, a textbook loan provision,[89] and it disapproved, again, a provision for loaning instructional materials—although in *Wolman*, unlike *Meek*, the provision was styled as a loan to students and their parents rather than a loan directly to religious schools.[90] *Wolman* also involved types of aid not considered in *Meek*, and accordingly it provided some guidance as to the limits of *Meek*'s rationale.

The Court's treatment of the new items of aid was mixed in its results. The Court approved the state's provision and scoring of standardized tests used also in the public schools. Because the tests were prepared and evaluated by the state, the Court contended, they could not be used for religious indoctrination. For that reason, the testing program did not violate the effects test by providing "direct aid" to religion.[91] And because the program presented no serious risk of indoctrination, no entangling supervision of the

85. 433 U.S. 229 (1977).
86. 463 U.S. 388 (1983).
87. 474 U.S. 481 (1986).
88. 509 U.S. 1 (1993).
89. *Wolman*, 433 U.S. at 236–38.
90. *See id.* at 249–51; *see also id.* at 250 (noting that the instructional materials were indistinguishable in kind from those involved in *Meek*, and stating that "it would exalt form over substance" if the program's different legal form "were found to justify a result different from that in *Meek*"). The remark is ironic because the distinction between direct and indirect aid is, at least on its face, one of form rather than substance.
91. *Id.* at 240.

religious schools would be necessary.[92] The Court further approved speech and hearing diagnostic services, and psychological diagnostic services, to be conducted by state personnel in the nonpublic schools.[93] These state employees' tasks would not be educational in nature, the Court said, and accordingly their services, unlike teaching or counseling, offered no occasion for "the transmission of sectarian views."[94] For that reason, the program did not have the primary effect of advancing religion.[95] Further, because the diagnostic services offered no opportunity for religious indoctrination, the state would not need to engage in entangling supervision.[96]

The Court disapproved, however, a provision authorizing bus transportation for field trips by nonpublic school students. The Court distinguished its holding in *Everson v. Board of Education*,[97] which had approved state reimbursement for bus transportation to and from schools, including religious schools. Unlike the transportation approved in *Everson*, the Court explained, field trips were "an integral part of the educational experience,"[98] and the planning and direction of those trips offered the opportunity for the religious-school teachers who directed the trips to engage in religious indoctrination. Accordingly, for the state to fund these trips would be impermissible "direct aid" to religious schools' educational function.[99] Moreover, monitoring the field trips to ensure religious neutrality would require entangling government supervision.[100]

The part of *Wolman* that will be directly relevant in *Agostini* concerns the Court's treatment of "auxiliary services" to be performed in neutral locations off religious-school premises. Some of these "auxiliary services"—therapeutic psychological and speech and hearing services, guidance services, "remedial services," and services for the handicapped—resemble those at issue in *Aguilar* and *Agostini*. The Court noted in *Wolman* that "the programs are not intended to influence the classroom activities in the nonpublic schools."[101] Further, because state personnel would provide these

92. *See id.* at 238–41. Justice Blackmun's opinion with respect to these services was for a plurality of four only, but three other Justices concurred in the judgment on this point.

93. *See id.* at 241–44.

94. *Id.* at 244.

95. *See id.* at 242.

96. *See id.*at 244. *Meek* had invalidated a similar provision, but only because that provision was not severable from the otherwise unconstitutional statute. *See* Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975).

97. 330 U.S. 1 (1947).

98. *Wolman*, 433 U.S. at 254.

99. *Id.* at 252–55.

100. *See id.* at 254.

101. *Id.* at 246 n.13. For further analysis of this issue, see *infra* notes 456–462 and accompanying text.

services off religious-school premises, away from the pressures of a "pervasively sectarian" environment, the Court found the risk of state-funded religious indoctrination to be insignificant.[102] For that reason, there would be no need for entangling supervision.[103]

*Wolman*, then, is simply a matter of applying *Meek* to a new set of facts and evaluating the constitutionality of a laundry list of statutory provisions authorizing aid to nonpublic schools. The Court's decision eight years later in *Ball*, however, develops *Meek*'s effects rationale by deciding the effects question *Meek* left open: whether "substantial" government expenditures to enrich religious schools' curricula are unconstitutional "direct and substantial" aid. *Ball*'s elaboration of *Meek*'s effects analysis has central significance for purposes of this Article because it is the prime target of the Court's law-transforming decision in *Agostini*.

### b. *Ball*

In the two programs at issue in *Ball*—the "Shared Time" and "Community Education" programs—the City of Grand Rapids offered courses to nonpublic school students on the premises of nonpublic schools.[104] Of the forty-one participating schools, forty were "pervasively sectarian."[105] Community Education classes were taught after school to elementary-school students, mostly in subjects included also in the public school curriculum.[106] The teachers generally were full-time employees of the nonpublic schools.[107] The Shared Time program offered "remedial" and "enrichment" courses in reading and mathematics, as well as courses in art, music, and physical education. Public school teachers taught the challenged courses during the regular school day to nonpublic elementary-school students.[108] For each program, the public school district "leased," for a nominal fee, classrooms from the nonpublic schools.[109] Religious symbols were removed from the

102. *Wolman*, 433 U.S. at 246–47.

103. *See id.* at 248.

104. *See* School Dist. v. Ball, 473 U.S. 373, 375 (1985), *overruled in part by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

105. *Id.* at 379.

106. *See id.* at 376–77 (listing "Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation").

107. *See id.* at 377. For purposes of the program, these teachers were classified as part-time public-school employees. *See id.*

108. *See id.* at 375–76. About 10% of the teachers had taught before in nonpublic schools.

109. *See id.* at 377. The fee was $6 per classroom per week. The quotation marks around the word "leased" appear in the Court's opinion, suggesting the Court's skepticism that the arrangement was genuinely an arms-length lease transaction.

rooms, and a sign was posted outside declaring the room a public-school classroom.[110]

The Court held that both programs violated *Lemon*'s effects test in three ways. First, relying upon *Meek*, the Court found in both programs a constitutionally unacceptable risk that government-subsidized teachers would engage in religious indoctrination. This risk was most apparent in the Community Education program, in which most of the instructors taught the very same students, in the same religious schools, during the regular schoolday.[111] The argument was more difficult for the Court with respect to the Shared Time program, in which the instructors were mostly full-time public school teachers. Nonetheless, the Court emphasized the effects of the pervasively sectarian environment, in which, as *Meek* had observed, secular and religious education were intertwined. Shared Time teachers, the Court observed, taught "academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious schoolday."[112] The fact that the programs' challengers had identified no instances of actual indoctrination was irrelevant for two reasons: First, the school district did not monitor the program for religious content, and second, neither the teachers themselves, nor religious-school students, nor the parents who placed their children in religious schools, would be likely to report religious indoctrination if it occurred.[113] Following *Meek*, the Court took the "substantial risk" of state-funded indoctrination to be sufficient to invalidate the program—although in *Ball*, on effects grounds, rather than the entanglement grounds on which *Meek* had relied.[114]

*Ball*'s second theory of unconstitutional effect was one not mentioned in *Meek* but discussed, the Court said, in other cases:[115] the danger of

110. *See id.* at 378. The sign read: "Grand Rapids Public Schools' Room. This room has been leased by the Grand Rapids Public School District, for the purpose of conducting public school educational programs. The activity in this room is controlled solely by the Grand Rapids Public School District." *Id.* at 378 n.2.

111. *See id.* at 386–87.

112. *Id.* at 388 (citing Meek v. Pittenger, 421 U.S. 349, 371 (1975)). The Court's observation seems to me more relevant to its other two theories of unconstitutional effect, discussed later in the text.

113. *See id.* at 388–89.

114. The Court tejected the argument, offered by Shared Time's defenders, that the program merely supplemented but did not supplant the religious schools' existing course offerings. In so holding, the Court noted that the same argument had been made and rejected in *Meek*. *See id.* at 388 (quoting *Meek*, 421 U.S. at 371). The Court rejected this same argument also under the heading of its "subsidization" theory of unconstitutional effect. *See infra* notes 126–132 and accompanying text.

115. *See Ball*, 473 U.S. at 390–91. The Court relied most heavily on *Zorach v. Clauson*, 343 U.S. 306 (1952), but mentioned also *McCollum v. Board of Education*, 333 U.S. 203 (1948).

"symbolic union" between church and state. In the Court's words, "[g]overnment promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines."[116] A "core purpose" of the Establishment Clause, the Court said, would be frustrated if such an identification conveyed a "message of government endorsement or disapproval of religion."[117]

*Ball* based its finding of "symbolic union" largely on the location of Shared Time and Community Education classes: pervasively sectarian schools, in which secular and religious education were ordinarily intertwined. In that setting, the Court reasoned, the "students would be unlikely to discern" the difference between the religious school's regular classes and the government-sponsored Shared Time classes.[118] According to the Court, even the school district's attempt to distinguish between church and state—the sign proclaiming the classrooms to be public-school classrooms—would stand as "a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day."[119] Perhaps the best statement of what the Court meant by "symbolic union" is its quotation from Judge Friendly's statement in *Aguilar*, companion case to *Ball*:

> Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.[120]

The Court found a third unconstitutional effect in *Ball*—governmental subsidization of religion. This notion of subsidization was an attempt to explain what *Meek* had meant by "direct and substantial aid." The Court acknowledged that in classifying programs as permissible "direct and substantial" aid, or impermissible "indirect and incidental" aid, the Court had not always given the terms "direct" and "indirect" the most straightforward significance. In particular, the Court had not drawn the constitutional distinction simply by looking to the aid program's legal form. In *Wolman*, for

116. *Ball*, 473 U.S. at 389.
117. *Id.*
118. *Id.* at 391.
119. *Id.* at 392.
120. *Id.* (internal quotation marks omitted) (quoting Felton v. United States Dep't of Educ., 739 F.2d 48, 67–68 (2d Cir. 1984)).

example, the Court gave no constitutional significance to the fact that the challenged instructional materials were loaned to students and parents rather than directly to the religious schools.[121] Following *Meek* and *Wolman*, the Court held that because "pervasively sectarian" schools unite religious and secular education,[122] substantial aid to "the educational function of the religious school" has the unconstitutional effect of advancing religion.[123] By taking over a substantial function of the religious schools' educational function, the Court explained, the government in effect subsidized the parochial schools' religious mission.[124] And if the loans of instructional materials considered in *Meek* and *Wolman* amounted to a subsidy to sectarian schools, the Court concluded in *Ball*, then "[i]t follows *a fortiori* that the aid here, which includes not only instructional materials but also the provision of instructional services by teachers in the parochial school building, 'inescapably [has] the primary effect of providing a direct and substantial advancement of the sectarian enterprise.'"[125]

Defenders of the Community Education and Shared Time programs argued that because the challenged courses were supplementary to the schools' curricula, the programs did not subsidize the religious schools. The Court rejected this argument for four reasons. First, the same argument had been made, without success, in *Meek*.[126] Second, the Court said, "there is no way of knowing" whether the religious schools would have offered the challenged courses without the public support, and "[t]he distinction between courses that 'supplement' and those that 'supplant' the regular curriculum is therefore not nearly as clear as [the programs' defenders] allege."[127] Third, the Court maintained:

> [A]lthough the precise courses offered in these programs may have been new to the participating religious schools, their general subject matter—reading, mathematics, etc.—was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may thus be triggered despite the 'supplemental' nature of the courses.[128]

121. *See supra* note 90 and accompanying text.
122. *Ball*, 473 U.S. at 395 (citing Mueller v. Allen, 463 U.S. 388, 401–02 (1983); Board of Educ. v. Allen, 392 U.S. 236 (1968)).
123. *Id.* (citing Wolman v. Walter, 433 U.S. 229, 248–51 (1977); Meek v. Pittenger, 421 U.S. 349, 364 (1975)).
124. *Id.* at 394–95.
125. *Id.* at 396 (quoting *Wolman*, 433 U.S. at 250).
126. *See id.* (citing *Meek*, 421 U.S. at 368).
127. *Id.*
128. *Id.*

Fourth, "and most important," the notion of "supplemental" classes is sufficiently elastic as to pose no real limit. The Court suggested that a religious school could drop a course from the curriculum, only to replace it a year or so later with a supplemental course in the Shared Time or Community Education program.[129] The Shared Time program, as implemented at the time of the *Ball* decision, occupied 10% of the typical student's school day.[130]

> But there is no principled basis on which this Court can impose a limit on the percentage of the religious schoolday that can be subsidized by the public school. To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system.[131]

The Community Education and Shared Time programs, then, had the unconstitutional effect of "subsidiz[ing] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."[132]

### c. *Aguilar*

In *Aguilar*, the Court invalidated another program of aid to religious education, this time under *Meek*'s entanglement rationale. *Aguilar* is particularly significant for purposes of this Article: Twelve years later, recaptioned *Agostini v. Felton*, that same case provided the Court occasion to transform its Establishment Clause doctrine by renouncing the principles established in *Ball* and *Aguilar*.

The statutory scheme at issue in *Aguilar* and later in *Agostini*, originally enacted as Title I of the Elementary and Secondary Education Act of 1965,[133] provides federal funds to states, and through the states to "local educational agencies" (LEAs), for remedial education and for guidance and

129. *Id.* at 396–97.
130. *See id.*
131. *Id.* at 397.
132. *Id.*
133. Pub. L. No. 89-10, §§ 1001–14802, 79 Stat. 27 (1965). The program, which has been modified in ways immaterial to the Court's decisions in *Aguilar* and *Agostini*, *see* Agostini v. Felton, 117 S. Ct. 1997, 2003 n.* (1997), is presently codified at 20 U.S.C. §§ 6301–8962 (1994). I call it "Title I" throughout this Article, notwithstanding the fact that with amendment and recodification its name has changed. In this matter of nomenclature, I follow *Agostini*. *See Agostini*, 117 S. Ct. at 2003 n.*.

counseling services.[134] To be eligible for these services, students must both reside in a low-income area[135] and be either failing or at risk of failing to meet the state's performance standards.[136] LEAs must distribute Title I services "equitabl[y]" to public and private schools, including sectarian religious schools. With respect to private school students, the courses and services must be "secular, neutral, and nonideological,"[137] and the Title I funds must "supplement," not "supplant," the "amount of funds that would . . . be made available from non-Federal sources."[138] Title I further requires private-school services to be rendered by public employees or others "independent of [the] private school and of any religious organization."[139]

In its original Title I plan, the New York City Board of Education transported private-school children—of whom probably about 90% attended sectarian schools[140]—to public schools after school hours. Soon after, however, the board abandoned that plan because of poor attendance, wear and tear on students and teachers, safety concerns, and difficulties in communication between the children's regular and Title I teachers.[141] Instead, the board decided to provide Title I services on the private schools' premises during school hours. Public school employees taught classes in remedial reading and remedial arithmetic, and provided speech-therapy and guidance-counseling services.[142] The shift to on-premises services saved significant amounts of money and was more effective educationally.[143] In the revised program, the public-school personnel were instructed that they answered only to the public school system, that they should avoid involvement in religious activity at school, and that they should keep their contact with religious-school teachers professional. Religious symbols had to be

134. *See Agostini*, 117 S. Ct. at 2003 (citing 20 U.S.C. §§ 6315(c)(1)(A), (E), 6314(b)(1)(B)(i), (iv)).

135. *See id.* at 2003–04 (citing 20 U.S.C. § 6313(a)(2)(B)).

136. *See id.* (citing 20 U.S.C. § 6315(b)(1)(B)).

137. 20 U.S.C. § 6321(a)(2).

138. *Id.* § 6322(b)(1).

139. *Id.* § 6321(c)(2)(A), (B).

140. "Probably" because the earliest figure mentioned in the various *Aguilar/Agostini* opinions is from 1981–82. That figure is 92%: 84% of the nonpublic schools students attending schools affiliated with the Catholic Church and 8% attending Hebrew day schools. *See* Felton v. United States Dep't of Educ., 739 F.2d 48, 51 (2d Cir. 1984); *see also* Aguilar v. Felton, 473 U.S. 402, 406 (1985) (same figures), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

141. *See Felton*, 739 F.2d at 51.

142. *See id.* The Supreme Court described the programs as "includ[ing] remedial reading, reading skills, remedial mathematics, and English as a second language, and guidance services." *Aguilar*, 473 U.S. at 406.

143. *See Felton*, 739 F.2d at 51 (noting that a study commissioned for the 1977–78 school year found that the change saved transportation and other expenses that would have been "more than 42% of the budget for the nonpublic school Title I program").

cleared from the classroom before Title I instruction could begin. Finally, New York City's program provided for unannounced visits by field supervisors to check for compliance with these rules.[144]

The Court began by noting its decision in the companion case, *Ball*, which had invalidated programs "very similar" to New York City's Title I plan.[145] "In both cases," the Court noted,

> publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.[146]

Defenders of the city's plan attempted to distinguish *Ball*, by pointing out that New York, unlike Grand Rapids, had adopted a "system for monitoring the religious content" of instruction and counseling.[147] But this monitoring, the Court maintained, did not fully distinguish *Ball* and its holding of unconstitutional effect: "At best," the Court said, "the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school."[148] Apparently, then, even if the city's monitoring eased concern about state-sponsored indoctrination, the program still would have the unconstitutional effects of creating a symbolic union between church and state and subsidizing religious activity. The Court confirmed this interpretation by noting, in the opinion's closing paragraph, that the city's Title I program violated *Lemon*'s effects test.[149]

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144. *See Agostini*, 117 S. Ct. at 2004–05; *Aguilar*, 473 U.S. at 406–07; *Felton*, 739 F.2d at 53.
145. *Aguilar*, 473 U.S. at 408–09.
146. *Id.* at 409.
147. *Id.*
148. *Id.*
149. In the Court's words:

> Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate—that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.

*Id.* at 414.

Justice O'Connor, in dissent, understood the Court's opinion to rest entirely on an entanglement basis. "Recognizing the weakness of any claim of an improper purpose or effect," O'Connor wrote, "the Court today relies entirely on the entanglement prong of *Lemon* to invalidate the New

The Court, however, did not analyze in any detail how *Ball*'s effects reasoning applied to the "very similar" but not identical program in *Aguilar*. Instead, the Court simply carried over *Ball*'s effects premise—that the challenged plan created a substantial risk that public employees would engage in religious indoctrination—and then, as in *Meek*, focused on the impermissible entanglement that supervision of these employees in parochial schools would cause.

As in prior cases that raised entanglement concerns, the Court noted, the environment in which government provided aid was "pervasively sectarian," and the aid came in the form of services rendered by teachers and counselors, who would require "ongoing inspection . . . to ensure the absence of a religious message."[150] Further, the Court said, the values behind the prohibition on entanglement were implicated in New York City's Title I program. State supervision of Title I instruction in parochial schools threatened to impose bureaucratic control upon religious activity through ongoing governmental monitoring, judgments by government employees as to what is and is not a religious symbol, and ongoing administrative contacts between government and religious schools to work out details of the bureaucratic intervention.[151] As the Court put it (undoubtedly hyperbolically):

> [T]he religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.
>
> . . . .
>
> [T]he detailed monitoring and close administrative contact required to maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." . . . The numerous judgments that must he made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. . . . At the same time, "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'"[152]

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York City Title I program." *Id.* at 426 (O'Connor, J., dissenting). This reading is mistaken, though perhaps understandably in light of the Court's terseness regarding unconstitutional effect.

150. *Id.* at 412 (opinion of the Court).

151. *See id.* at 414.

152. *Id.* at 413–14 (citation omitted) (alteration in original) (quoting Lemon v. Kurtzman, 403 U.S. 349, 650 (1975) (Brennan, J., concurring)).

In the Court's view, the Title I program implicated, also, the risk of state favoritism toward a particular denomination, presenting "the dangers of political divisiveness along religious lines."[153] While the Court did not specify which religious lines it had in mind, presumably it was considering the overwhelming percentage of private schools receiving Title I funds that were affiliated with the Roman Catholic church.[154]

Thus, in sum, the Court held the following in *Aguilar*. The program of monitoring, offered as a distinction between the Title I program in *Aguilar* and the "very similar" programs in *Ball*, unconstitutionally entangled government and religion. Further, New York City's Title I program had the unconstitutional effect of advancing religion—although whether only through symbolic union and subsidization or also through indoctrination remains unclear.

### d. The Effect of *Ball* and *Aguilar*

The outcomes in *Ball* and *Aguilar* follow straightforwardly from *Meek*.[155] The reasoning in those cases, however, works two changes on prior doctrine: one concerning the entanglement test, and the other concerning the effects test.

The change with respect to the entanglement test is the correction of a conceptual difficulty in the Court's prior uses of that test. Put simply, the difficulty is that *Lemon* and *Meek* invalidated government aid programs by finding only a hypothetical entanglement between church and state. Consider, first, *Lemon*. In that case, the Court said that providing salary supplements to religious-school teachers is unconstitutional because state monitoring of religious education *would* be required, if the state were to be certain that it did not support religious indoctrination. And this monitoring *would* entangle church and state impermissibly. But no actual state monitoring took place. How, then, can state and church be entangled by monitoring that never took place? Similarly, in *Meek*'s treatment of the auxiliary services provision,[156] the Court said that the state, in sending its employees into religious schools to perform teaching and counseling services, would need to monitor those employees to ensure that they did not engage in religious indoctrination. This monitoring, too, *would* entangle

153. *Id.* at 414.

154. *Cf. id.* at 412 (noting that Catholic schools "constitute the vast majority of the aided schools").

155. Justice O'Connor acknowledged as much in her dissenting opinion. For that reason, she argued that *Meek* and *Wolman* should be overruled, at least in part. *See id.* at 427 (O'Connor, J., dissenting).

156. *See supra* notes 79–84 and accompanying text.

church and state. But here, too, no actual monitoring took place. Why, then, is the entanglement test the basis for invalidation?

*Ball* and *Aguilar*, in combination, resolve this difficulty by revising the relation between the two tests. The Community Education and Shared Time programs evaluated in *Ball*, like the auxiliary services provision invalidated in *Meek*, sent public employees into religious schools to teach and counsel. In both cases, the Court found a substantial risk that the publicly employed teachers and counselors would engage in religious indoctrination if they were not closely monitored. And in both cases, no actual monitoring took place. But *Ball* answers the question that *Meek* ducked in its reliance on the entanglement test: Does this kind of program provide direct and substantial aid to the religious schools' educational function, in violation of the effects test? *Ball* answers that question in the affirmative. According to *Ball*, then, if no actual monitoring has occurred, the effects test, not the entanglement test, is the relevant Establishment Clause criterion. Only if monitoring (or other administrative connection between church and state) actually has taken place—as in *Aguilar*—is the entanglement test the relevant criterion.

*Ball* also makes modest adjustments in the effects test. *Meek* and *Wolman* had suggested that the sole criterion for an effects violation is whether the government has provided direct and substantial aid to religious institutions. *Ball* adds "symbolic union" as an effects criterion. While the Court attributes this idea of symbolic union to pre-*Lemon* precedent,[157] it likely had another source in mind. As shortly to be discussed, the year before *Ball*, Justice O'Connor had suggested government "endorsement" of religion as an Establishment Clause criterion.[158] The Court seeks to incorporate O'Connor's suggestion by noting that its "symbolic union" criterion would be violated if the government "convey[ed] a message of . . . endorsement or disapproval of religion."[159]

The other two effects criteria *Ball* employs—state-sponsored or state-financed religious indoctrination, on one hand, and state subsidization of

157. *See supra* note 115 and accompanying text.

158. *See* Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring).

159. School Dist. v. Ball, 473 U.S. 373, 389 (1985) (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)), *overruled in part by* Agostini v. Felton, 117 S. Ct. 1997 (1997); *id.* at 390 ("[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."); *id.* at 392 ("[E]ven the student who notices the 'public school' sign temporarily posted would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day.").

religion or religious institutions, on the other—sound indistinguishable, and on their face they bear an uncertain relation to *Meek*'s criterion of "direct and substantial aid to the educational function of religious schools." Consider first the question whether the Court's two criteria are distinguishable. By state-sponsored or state-financed religious indoctrination, the Court seems to focus on whether the state itself is directly engaged in religious indoctrination. In the context of school-aid cases, the core instance is when state personnel—primarily teachers or guidance counselors—themselves participate in religious instruction or counseling. The Court, through its *Ball* and *Aguilar* decisions, did not require proof that state employees actually were performing religious indoctrination. Rather, presumably for prophylactic purposes and to ease problems of proof,[160] a substantial risk that they would do so sufficed.

With its subsidization criterion, however, the Court seems to focus on a different way in which government aid could have the effect of advancing religion. Even if state personnel do not themselves directly engage in indoctrination, state financing of religious-school activities could have the subsidizing effect of freeing up the religious school's resources for sectarian purposes. In *Meek* and *Wolman*, for example, providing secular instructional materials did not present the risk that those materials themselves would be used for religious indoctrination.[161] What the Court found objectionable, instead, was that this form of aid to the religious school's "educational function" relieved the religious school of the burden of providing similar materials itself. As a result of the government aid, the religious school was better able to expend its scarce resources on specifically religious education.

So understood, both of these effects criteria express the "direct and substantial aid" formulation of *Meek* and *Wolman*, though with different focus and emphasis. When state personnel actually engage in religious indoctrination, they provide direct assistance to the religious school's sectarian mission.[162] When the government provides direct and substantial aid to a religious school's educational function, whether or not through the indoctrinating activity of its own personnel, the state on *Ball*'s view has subsidized the religious schools' sectarian activity. In either way, *Ball*

160. The main problem of proof is the one mentioned in *Ball*: Without monitoring, no one has sufficient incentive to report instances of religious indoctrination. *See supra* note 113 and accompanying text.

161. *See supra* notes 72–75, 90 and accompanying text.

162. *Ball* does not require programs' challengers to show actual indoctrination. The Court's challenger-friendly formulation of "substantial risk" of indoctrination operates as a prophylactic rule and eases problems of proof. *See supra* note 160 and accompanying text.

maintains, the government has advanced religion by providing direct and substantial aid to the religious school's educational function.

2. The *Mueller*, *Witters*, and *Zobrest* Line

Two years before *Ball* and *Aguilar* were decided, the Court inaugurated a second line of precedent that ran alongside the *Meek*, *Wolman*, *Ball*, and *Aguilar* line of cases. In these cases—*Mueller*, *Witters*, and *Zobrest*—the Court classified the challenged government aid as indirect and incidental and upheld the program against Establishment Clause challenge. One might wonder why I treat these cases as occupying a line separate from the *Meek* to *Aguilar* line, when they, too, operate with the same effects criterion used in *Meek*. The first reason is that these cases reach the "indirect and incidental aid" conclusion by using principles not used in the *Meek* line. The second reason is that the Court in *Agostini* takes these cases themselves to have effected a fundamental transformation in Establishment Clause doctrine. *Witters* and *Zobrest*, the Court argues in *Agostini*, have in effect overruled the line of cases from *Meek* to *Aguilar*.

a. *Mueller*

The statute considered in *Mueller* was a state tax provision allowing deductions for primary and secondary educational expenses, including tuition, transportation, textbooks, instructional materials, and the like. The challengers to this statute argued that the only significant deductions were for tuition expenses, and that the overwhelming majority of persons who could claim those deductions were parents of children in religious schools.[163] For that reason, they argued, the statute's primary effect was to advance religion.

In an opinion by then-Justice Rehnquist, the Court posed the question narrowly, as whether the statutory scheme bore "greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down."[164] Several considerations indicated that the statute resembled the former, approved kind of assistance. First, the Court noted, past cases "consistently have recognized that traditionally '[l]egislatures have especially broad latitude in creating classifications . . . in tax statutes.'"[165] As a tax provision, the challenged statute was "entitled to

163. Mueller v. Allen, 463 U.S. 388, 400–07 (1983).
164. *Id.* at 394.
165. *Id.* at 396 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983)).

substantial deference."[166] Second, the Court observed that the statute was facially neutral, making the benefit "'available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'"[167] A statute that "neutrally provides state assistance to a broad spectrum of citizens," the Court said, "is not readily subject to challenge under the Establishment Clause."[168] Third, the Court found it significant that the state had "channel[ed] whatever assistance it may provide to parochial schools through individual parents."[169] Even if religious schools received "attenuated financial benefits"[170] because of parents' greater ability to afford tuition expenses, still, funds reached religious schools only indirectly, "as a result of numerous private choices of individual parents of school-age children."[171] In this way, the Court distinguished the cases that had found impermissible direct aid.[172]

### b. *Witters*

*Witters* was decided one Term after *Ball* and *Aguilar*, and three years after *Mueller*. The issue in *Witters* was whether the Establishment Clause barred a state agency from providing a tuition grant, under a general statute authorizing vocational assistance to blind persons, to a particular student who planned to use the grant at a Christian college for the purpose of becoming a pastor, missionary, or youth director. The sole question was whether such a grant would violate the effects standard of the *Lemon* test. The Court decided unanimously, with the opinion authored by Justice Marshall, that the grant was permissible.[173]

166. *Id.*; *see also id.* at 397 n.6 (referring to "the traditional rule of deference accorded legislative classifications in tax statutes").

167. *Id.* at 398 n.8 (quoting Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782–83 n.38 (1983)).

168. *Id.* at 398–99.

169. *Id.* at 399. In so doing, the Court said, the state had "reduced the Establishment Clause objections to which its action is subject." *Id.*

170. *Id.*

171. *Id.*

172. *See id.* The Court also questioned whether the taxation scheme actually benefited parents of private-school students. Such parents, who paid both taxes to support the public schools and tuition to private schools, yet did not use the public schools' services, were perhaps receiving a "rough return" from the state through the tax deduction provision. *See id.* at 401–02. The Court further questioned the challengers' statistical analysis, *see id.* at 400 n.9, and it noted that the Court "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401.

173. Eight Justices joined the full opinion. Justice O'Connor did not join the section that contained the effects analysis, noting in a short concurrence that she reached the same result

Although the Court did not rely expressly on *Mueller*,[174] its opinion tracked *Mueller*'s reasoning. The Court noted that the grant went directly to the student, who chose the institution at which to spend it. Thus, as in *Mueller*, "[a]ny aid provided under [the state's] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[175] Benefits were "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[176] The program created no incentive to undertake religious education, the Court noted, and in fact the secular alternatives were more numerous.[177] For these reasons, the Court said, "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State."[178]

"Further and importantly," the Court said, "nothing in the record indicates that . . . any significant portion of the aid expended under the [state] program . . . will end up flowing to religious education."[179] No other person, on the record presented, had used one of the program's grants for religious education. For these reasons, the Court held, distinguishing *Ball*, the program did not operate as a subsidy to religious education.[180] "The combination of these factors," the Court concluded, made the connection between the state and the religious institution at which the grant was used "a highly attenuated one." The aid did not reach a religious school because of "a *state* action sponsoring or subsidizing religion."[181]

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under her recently announced endorsement test. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring).

174. Justice Marshall had dissented strenuously in *Mueller*, *see* 463 U.S. at 404 (Marshall, J., dissenting), and presumably for that reason he refused to cite the case for any substantive proposition. Five concurring Justices in *Witters*, however, wrote separately to suggest *Mueller*'s relevance. *See Witters*, 474 U.S. at 490 (Powell, J., concurring) ("The Court's omission of *Mueller v. Allen* . . . from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one. I write separately to emphasize that *Mueller* strongly supports the result we reach today." (citation omitted) (footnote omitted)); *id.* (White, J., concurring) ("I agree with most of Justice Powell's concurring opinion with respect to the relevance of *Mueller v. Allen* . . . to this case." (citation omitted)); *id.* at 493 (O'Connor, J., concurring) ("Justice Powell's separate opinion persuasively argues" that *Mueller* establishes the grant's constitutionality). Chief Justice Burger and then-Justice Rehnquist joined Justice Powell's concurring opinion.

175. *Witters*, 474 U.S. at 487.

176. *Id.* (citing *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782–83 n.38 (1973), but refusing to acknowledge that *Mueller* had quoted the same language).

177. *See id.* at 488.

178. *Id.*

179. *Id.*

180. *See id.*

181. *Id.*

### c. *Zobrest*

*Zobrest*, like *Witters*, involved the question whether the Establishment Clause bars the government from providing aid, under a general and neutral statute, to a disabled person seeking educational assistance. The statute at issue in *Zobrest* was the federal Individuals with Disabilities Education Act (IDEA).[182] The assistance sought was an interpreter for a deaf student who attended a Catholic high school. The constitutional difficulty was that the state-paid interpreter would be relaying all of the instruction offered in the sectarian school, including specifically religious instruction.

The Court upheld the provision of an interpreter, relying on *Mueller* and *Witters*. As did the programs in both those cases, IDEA makes benefits "'available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'"[183] The statute provides "parents freedom to select a school of their choice," and "a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."[184] In fact, the Court said, the case was "even easier" than *Mueller* and *Witters*. Because the aid came in the form of services rather than cash, "no funds traceable to the government ever find their way into sectarian schools' coffers."[185] While a school might receive the "indirect economic benefit" of a particular student's tuition, this conclusion rests on a number of assumptions: "that the school makes a profit on each student; that, without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot."[186]

The Court distinguished *Meek* and *Ball*. *Meek* involved "massive aid"[187] to religious schools, and the "direct grants of government aid" in both *Meek* and *Ball* "relieved sectarian schools of costs they otherwise would have borne in educating their students."[188] But in *Zobrest*, the school would not have provided an interpreter without the IDEA assistance, and thus the aid did not have the effect of subsidizing the religious school by relieving it of costs it otherwise would have borne.[189] The aid, moreover, did not go directly to the religious school, and "any attenuated financial benefit that

182. 20 U.S.C. §§ 1400–1487 (1994 & Supp. 1996).
183. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (quoting *Witters*, 474 U.S. at 487).
184. *Id.*
185. *Id.*
186. *Id.* at 10–11.
187. *Id.* at 11 (quoting Meek v. Pittenger, 421 U.S. 349, 364–65 (1975)).
188. *Id.* at 12.
189. *See id.*

parochial schools do ultimately receive from the IDEA is attributable to 'the private choices of individual parents,'"[190] not to "state decisionmaking."[191]

With this reasoning, the Court held that the provision of aid did not offend *Ball*'s subsidization theory of unconstitutional effect. The Court further rejected the argument that providing a government-paid interpreter would violate *Ball*'s first effects standard—the prohibition on state employees' participation in religious indoctrination. The Court reasoned that "the task of a sign-language interpreter" is "quite different from" the tasks of the teachers and guidance counselors whose services were at issue in *Ball*.[192] The Establishment Clause "lays down no absolute bar to the placing of a public employee in a sectarian school,"[193] the Court said, and the religious indoctrination whose content the interpreter faithfully conveyed would be independent of state action. The student's parents chose the sectarian environment, and "[t]he sign-language interpreter they have requested will neither add to nor subtract from that environment."[194] Accordingly, no state employee was responsible for religious indoctrination.

### d. Implications of the *Mueller*, *Witters*, *Zobrest* Line

In one sense, the line of cases running from *Mueller* to *Zobrest* coexists peacefully with *Meek*, *Wolman*, *Ball*, and *Aguilar*. *Ball* and *Aguilar*, decided two years after *Mueller*, do not refer to *Mueller* for any substantive purpose, nor did any of the *Ball* and *Aguilar* dissents argue that the decisions in those cases were inconsistent with *Mueller*. Viewed from the other side, *Witters*, decided the Term after *Ball* and *Aguilar*, specifically distinguishes *Ball*,[195] as well as *Meek*[196] and *Wolman*.[197] *Zobrest*, decided seven years later, distinguishes both *Meek* and *Ball*.[198] The two lines of precedent establish and

190. *Id.* (quoting Mueller v. Allen, 463 U.S. 388, 400 (1983)).
191. *Id.* at 10.
192. *Id.* at 13.
193. *Id.*
194. *Id.*
195. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 n.4 (1986) ("This is not the case described in *Grand Rapids School District v. Ball* . . . ."); *id.* at 489 ("[W]hile . . . aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is 'clearly prohibited under the Establishment Clause,' [*Ball*, 473 U.S.] at 395, because it may subsidize the religious functions of that institution, that observation is not apposite to this case.").
196. *See Witters*, 474 U.S. at 488.
197. *See id.* at 487 n.4.
198. *See Zobrest*, 509 U.S. at 11–13. *Zobrest* relies on *Wolman*'s approval of forms of aid that *Wolman* classified as "indirect and incidental." *Id.* at 10, 13 n.10.

maintain their coexistence with their mutual use of the basic constitutional distinction, expressed in *Meek*, between permissible "indirect and incidental aid" and forbidden "direct and substantial aid."[199]

Nonetheless, a Court interested in transforming Establishment Clause law could find promising possibilities in the line of precedent that began with *Mueller*. The Court said in *Mueller* that a statute that "neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[200] In that case, as well as in *Witters* and *Zobrest*, the Court considered the program's generality and neutrality to be only one of several factors pointing to the program's constitutionality.[201] But if the Court were to make this principle a sufficient condition for a program's constitutionality, and not merely a necessary condition, then the Court could validate a wide range of aid programs—including a comprehensive school voucher plan, such as the one recently upheld by the Wisconsin Supreme Court.[202] Generality and neutrality do

199. *See* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 24 (1996) ("*Mueller*, *Witters*, and *Zobrest* show that the Court treats indirect benefits to religious institutions differently from direct benefits.").

200. Mueller v. Allen, 463 U.S. 388, 398–99 (1983).

201. In one sentence in *Zobrest*, the Court suggested that it might be a sufficient condition. The Court wrote: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Zobrest*, 509 U.S. at 10 (quoting *Witters*, 474 U.S. at 488). The rest of the opinion, however, takes care to distinguish the cases that invalidate direct and substantial aid to religious schools' educational function. And elsewhere in the opinion, as in its use of the passage from *Mueller* quoted above in text, the Court takes the generality and neutrality of a challenged program to be only one factor in determining the program's constitutionality. For these reasons, I do not take the sentence quoted at the beginning of this footnote to be a law-changing statement. Neither, incidentally, does *Agostini* rely on the unusual strength of this sentence in deciding that *Zobrest*, together with *Witters*, so changed the law as to render *Ball* and *Aguilar* no longer good law.

202. *See* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 67 U.S.L.W. 2184 (U.S. Nov. 9, 1998) (No. 98-376). In *Jackson*, the court upheld a tuition grant program against an Establishment Clause challenge. Under that program, up to 15% of Milwaukee's public school students whose family income does not exceed 1.75 times the federal poverty level are eligible to attend private schools, including sectarian schools, with the state paying at least some of the tuition costs—either the average per-pupil expenditure in the Milwaukee public schools or the private school's per-student costs, whichever is lower. The payment takes the form of a check, given to the student's parents, that may be used only toward tuition at the relevant private school. The program allows participating students to opt out of any religious exercises at the private school. The state aid given to Milwaukee public schools is reduced by the amount paid to parents under the program. *See id.* at 608–09. In upholding this program, the Wisconsin court relied heavily on the *Mueller* to *Zobrest* line of cases, as well as on *Agostini*—the case, discussed in Part III below, that finds that line of cases effectively to overrule the *Meek* to *Aguilar* line. *See Jackson*, 578 N.W.2d at 613–19. The Court emphasized the generality and neutrality of the program's eligibility criteria, *see id.* at 617–18, as well as the principle, discussed in the next paragraph of text, that state money flowed to private schools only as a result of private decision making, *see id.* at 618–19.

not themselves place a significant constitutional limit on programs that benefit religious schools. These programs always can be cast so as to make aid available on equal terms to all educational institutions—both public and private, sectarian and nonsectarian.[203]

Similarly, a transformation of Establishment Clause doctrine could emphasize, as did the cases in the *Mueller* line, the mediating role that private decision making plays in determining whether and how state aid reaches religious institutions. All students who attend private schools are there by private choice. If it were made sufficient, to establish a challenged program's constitutionality, to show that religious schools would not have received any benefits from state aid absent private decision making, then any program of aid to religious schools could be made constitutionally valid. The technique would be simply to make aid available on a per-pupil basis, so that the religious school would not receive aid but for private decisions by students' parents. This kind of transformation of Establishment Clause doctrine, too, would lead to the upholding of voucher programs.[204]

Such transformations, however, would require some work on the Court's part. The Court would need to explain why the criteria of "generality and neutrality," or "private decisionmaking," should be sufficient conditions for a program's constitutionality. Or if the Court were to stop short of making these conditions sufficient, it would have to explain why they so strongly favor constitutionality that the principles in the *Meek* to *Aguilar* line no longer operate. Further, reliance on the *Mueller* line would have to acknowledge the peculiarities in each of the cases that arguably distinguish them from the *Meek* to *Ball* line: the tax context in *Mueller*, in which the Court relied upon a principle of "substantial deference"[205] to legislatively established taxation systems, and the fact that both *Witters* and *Zobrest* involved aid only to a negligible—or in *Meek*'s term, "insubstantial"—number of students. Or if the Court decided to transform Establishment Clause doctrine more fundamentally—by, for example, overruling *Lemon* and adopting some other theory of the Establishment Clause's limits,

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Courts pre-*Agostini* had struck down similar plans. *See, e.g.*, Simmons-Harris v. Goff, No. 96APE082-982, No. 96APE08-991, 1997 Ohio App. LEXIS 1766, at *27 (Ohio Ct. App. May 1, 1997).

203. *Cf.* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 263–64 (1994) (distinguishing between broad and narrow readings of *Zobrest* and suggesting that "it may prove to be extremely difficult to distinguish in practice aid to the families of disabled students from financial aid—via tuition vouchers or otherwise").

204. *See supra* note 202.

205. *Mueller*, 463 U.S. at 396; *see also id.* at 396–97 n.6 (referring to "the traditional rule of deference accorded legislative classifications in tax statutes").

independent of the *Lemon* precedents—then the Court would have to justify such a theory from first principles.

Any transformation of Establishment Clause doctrine would require also a will to change. But in fact, as the next section demonstrates, dissatisfaction on the Court with *Lemon* had begun to deepen even before *Ball* and *Aguilar* were decided, and by the late 1980s a majority of Justices had either proposed or endorsed a test that could serve as an alternative to *Lemon*. For reasons to be explored, however, general agreement that transformation was desirable did not soon translate into agreement on a particular strategy of transformation.

### B. Alternative Tests and *Lemon*'s Uncertain Status

The *Meek* to *Aguilar* line of cases was vulnerable from the start. Probably the most apparent weakness is that these cases rested the constitutionality of aid programs on fine distinctions whose constitutional relevance was hardly obvious. According to the Court's decision in *Meek*, for example, government could provide textbooks to religious-school students, but not instructional materials.[206] And under the Court's decision in *Wolman*, government could provide bus transportation to and from religious schools, but not bus transportation for religious schools' field trips.[207] One can fashion explanations for these distinctions—stare decisis, in the case of textbooks,[208] and the closer relation of field trips to religious schools' "educational function," in *Wolman*.[209] But even if these explanations were sufficient, the Court's underlying constitutional theory would face deeper difficulties, even on its own terms.

One difficulty is that the logical scope of the various effects standards, as presented in *Ball*, seems to exceed the Court's actual application of those

206. *See supra* notes 68–78, 89 and accompanying text.

207. *See supra* notes 97–100 and accompanying text.

208. As explained above, *see supra* notes 76–78 and accompanying text, the Court permitted textbook loan programs before adopting the *Lemon* test. The permissibility of such loans survived because of a peculiar coalition: Justices Stewart, Blackmun, and Powell adhered to the pre-*Lemon* decision for reasons of stare decisis, and on this issue they joined the Justices who were generally untroubled by any of the aid programs the Court considered. *See* Meek v. Pittenger, 421 U.S. 349, 359–62 (1975) (Stewart, J., joined by Blackmun and Powell, JJ.); *see also id.* at 385–87 (Burger, J., concurring in the judgment in part and dissenting in part); *id.* at 388–91 (Rehnquist, J., joined by White, J., concurring in the judgment in part and dissenting in part). Nonetheless, the Court remained committed to a constitutional distinction between books and, for example, maps. This distinction is easy to lampoon. *See, e.g.*, Edward McGlynn Gaffney, Jr., A *Case for Vouchers*, WASH. POST, June 29, 1998, at A15 (recounting Senator Daniel Patrick Moynihan's question whether "an atlas, a book of maps," would be constitutionally permissible).

209. *See supra* notes 98–99 and accompanying text.

standards. This difference in scope suggests that the Court applied its standards selectively and without a coherent theory. The subsidization theory provides a good example. In invalidating the Community Education and Shared Time programs, *Ball* takes a strong view of subsidization. By providing secular instruction in religious schools, the Court explains, the government frees up the schools' resources for specifically religious use and thus subsidizes religious education. This is so, the Court maintains, even if the challenged programs did not supplant existing courses at the religious schools. If the Court were to follow this theory to its logical conclusion, it would have to forbid *all* government assistance to religious schools, including the "indirect and incidental" aid previously permitted. Any such assistance either subsidizes an existing expenditure at religious schools—thus freeing up the school's resources for specifically religious use—or, if it does not supplant an existing expenditure, it nevertheless would subsidize the religious school by allowing it to offer a new and a better service.

As *Ball* notes, however, the Court has never consistently taken such a strong view of subsidization. Instead, from *Meek* to *Ball*, the Court used the notion of "aid to the religious schools' educational function" as a limiting device, invalidating some forms of aid as impermissible "subsidies" but permitting others. Still, if the constitutional evil is government subsidization of religious institutions, the "educational function" limitation seems ad hoc. Whether the aid goes to the school's educational function or to some other account, in either event the school would be "subsidized"—either in the sense that its resources would be freed up for specifically religious use, or in the sense that it could offer new and more attractive services. *Ball*'s subsidization theory thus seems logically to extend beyond the Court's application of that theory.

A similar difficulty afflicts *Ball*'s "government indoctrination" theory of unconstitutional effect. From *Meek* to *Ball*, the Court approached the indoctrination issue by invoking its statement in *Lemon*: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."[210] The Court used this statement to invalidate aid programs in which the risk of indoctrination seemed slight—for example, the Shared Time program in *Ball*, in which most of the state-paid teachers were public school employees, teaching secular subjects. The weakness in this approach is that the state never can be certain that its employees will refrain from religious indoctrination—in public schools as well as private schools. As Justice O'Connor observed, dissenting in *Ball*, if the Court were

210. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

to take *Lemon*'s pronouncement literally, government would have to close the public schools.[211]

The Court, of course, did not apply *Lemon*'s pronouncement literally. Instead, it distinguished among different kinds of public employees according to the risk that they would engage in religious indoctrination. But the Court's attentiveness to the different degrees of risk attributable to different professions only underscored the Court's refusal to ask—when it came to teachers and guidance counselors—whether, under the circumstances presented, the public employees were genuinely likely to engage in religious indoctrination.

The Court's indoctrination theory thus both overenforces and underenforces the Establishment Clause, even by its own criterion of proper enforcement. It overenforces by invalidating, wholesale, programs that involve state-paid teachers and guidance counselors, even those in which the actual instances of indoctrination likely would be few. It underenforces by approving programs involving other kinds of public employees, even though in those instances government cannot be certain that its employees will not engage in religious indoctrination. The *Lemon* "certainty" pronouncement operates as a convenient invalidating device in cases involving teachers and guidance counselors, but it is quickly forgotten when the activities of other kinds of public employees are at issue.

Moreover, the *Lemon* framework is vulnerable to more systematic criticism. First, even if we think government is barred from "advancing" religion, as *Lemon* maintains, from what baseline do we measure advancement? *Lemon* assumes that the constitutional baseline is no aid, so that any direct or substantial aid to religious schools unconstitutionally advances religion. This baseline might have been uncontroversial in the eighteenth century, before the rise of government-funded public schools. But under present conditions, with massive government aid given to public schools, invalidating all aid to religious schools is at least arguably a form of discrimination against religion rather than a refusal to advance religion. Perhaps a more appropriate baseline is the level of aid given to secular alternatives to religious institutions—public schools, in the present context. Such, at any rate, has been the argument of many commentators.[212]

211. *See* Aguilar v. Felton, 473 U.S. 402, 428–29 (1985) (O'Connor, J., dissenting), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

212. *See, e.g.*, Laycock, *Underlying Unity*, *supra* note 32; McConnell & Posner, *supra* note 32, at 10–20; McConnell, *Religious Freedom*, *supra* note 32, at 183–86; Paulsen, *supra* note 32, at 804–08 (noting that the no-aid baseline logically should bar any aid to religion, even indirect and incidental aid).

More fundamental objections still have been made against the *Lemon* test. Why would one think that the tripartite *Lemon* approach—even apart from its particular specification in the *Meek* to *Aguilar* line of cases—accurately expresses the Constitution's theory of impermissible establishment? Why is a law "advancing" religion the same thing as a law "respecting an establishment of religion"? By what standard does entanglement become "excessive entanglement"? Why would the Court choose a test that is worded in terms of a conclusion ("*excessive* entanglement")? The original explanation of the *Lemon* test was that it stated the factors the Court's developing case law had applied. But if one calls that case law into question, asking whether the Court had erred even in its pre-*Lemon* cases—a question most naturally asked from an originalist or historicist position in constitutional theory—then the *Lemon* framework would be more vulnerable still.

With changes in the Court's personnel,[213] the Justices grew more inclined to ask such questions and to criticize the difficulties in the *Lemon* approach. By the mid-1980s, a number of systematic alternatives to *Lemon* began to appear.[214] The first was one I have mentioned already: Justice O'Connor's endorsement theory, announced in 1984, the year before *Ball* and *Aguilar* were decided.[215] On that theory, first suggested as a "clarification" of Establishment Clause doctrine,[216] courts should inquire under the purpose part of the *Lemon* test "whether the government intends to convey a message of endorsement or disapproval of religion."[217] Under the effects part, the question is whether a challenged practice has "the effect of communicating a message of government endorsement or disapproval of

213. In 1981, Justice O'Connor replaced Justice Stewart, who had authored *Meek*. That, it turned out, left only five votes for the *Meek* approach. When Justice Scalia joined the Court in 1986, the *Meek/Aguilar* approach had only four remaining adherents.

214. I omit the views of former Chief Justice Burger, author of the *Lemon* test but soon a frequent dissenter from later invalidating decisions, and the views of Justice White, who did not join the *Lemon* opinion and disagreed fundamentally with its approach. *See, e.g.*, *Lemon*, 403 U.S. at 661–71 (White, J., concurring in the judgments in part and dissenting in part).

215. *See supra* notes 116, 119, 157–159 and accompanying text.

216. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (offering the endorsement test as a "clarification of our Establishment Clause doctrine"); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (stating that because the statute conveyed a message of endorsement, it had the "effect of advancing religion" and was therefore unconstitutional). I say "*first* suggested as a clatification" because later, in the *Kiryas Joel* case, O'Connor seems to recognize differences between the endorsement test and the *Lemon* approach. *See infra* notes 271–277 and accompanying text.

217. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring); *see also id.* at 690 ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion.").

religion,"[218] judged from the standpoint of an "objective observer."[219] O'Connor's first presentation of the endorsement test preserved, by its side, a revised version of the *Lemon* entanglement test. The test was revised in the sense that O'Connor understood it to reach only "institutional entanglement," or excessive entanglement between government and religious institutions; it did not include the more diffuse considerations of "political divisiveness" mentioned in the Court's early applications of the entanglement inquiry.[220]

O'Connor enjoyed particular power on the Court in Establishment Clause matters. Her endorsement theory placed her in a middle position between those who would maintain the aggressive *Lemon* approach exemplified in *Ball* and *Aguilar*—a group that by 1986 comprised less than a majority of the Court—and the soon-increasing group of Justices who preferred a far more lenient test.[221] O'Connor's vote, then, was much in demand, and her endorsement test quickly achieved significant success. As noted above, endorsement was one basis for the Court's holding in *Ball* that the challenged programs had unconstitutional effect.[222] The endorsement test appeared in other opinions for the Court as well—though, consistent with O'Connor's presentation of the endorsement test as a "clarification," it appeared alongside or within, rather than instead of, the *Lemon* test.[223] As will become clear, however, O'Connor did not gain support for her theory from the other Justices most critical of *Lemon*.

The year after O'Connor announced her endorsement theory, then-Justice Rehnquist filed a lengthy dissent in *Wallace v. Jaffree*,[224] denouncing the *Lemon* test and the "wall of separation" metaphor on which the Court's modern Establishment Clause precedent is founded. Rehnquist maintained that "[t]he true meaning of the Establishment Clause can only be seen in its history," and specifically in the historical record of the Framers' intentions.[225] What that record disclosed, he argued, was that "[t]he Framers

218. *Id.* at 692.

219. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment); *see also* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment).

220. *See Lynch*, 465 U.S. at 687–89 (O'Connor, J., concurring).

221. The relevant 1986 event was Justice Powell's replacement by Justice Scalia. Later, in 1991, the *Lemon* opponents picked up another seat when Justice Thomas replaced Justice Marshall.

222. *See supra* notes 116–117, 157–159 and accompanying text.

223. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993); County of Allegheny v. ACLU, 492 U.S. 573, 592–94, 595–97 (1989); Edwards v. Aguillard, 482 U.S. 578, 585, 593 (1987); Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

224. 472 U.S. at 91–114 (Rehnquist, J., dissenting).

225. *Id.* at 113.

intended the Establishment Clause to prohibit the designation of any church as a 'national' one" and "to stop the Federal Government from asserting a preference for one religious denomination or sect over others."[226] With the incorporation of the First Amendment into the Fourteenth, "[s]tates are prohibited as well from establishing a religion or discriminating between sects."[227] The Establishment Clause does not "requir[e] government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."[228] In announcing this standard, Justice Rehnquist differentiated his nonpreferentialist approach not just from the *Lemon* framework,[229] but from O'Connor's endorsement test as well.[230]

Justice Kennedy weighed into the *Lemon* controversy with his opinion in *County of Allegheny v. ACLU*.[231] Kennedy proposed a "coercion" test that would invalidate actions that "further the interests of religion through the coercive power of government," either by "compelling or coercing participation or attendance at a religious activity" or by "delegating government power to religious groups."[232] Acknowledging both "[p]ersuasive

226. *Id.*

227. *Id.*

228. *Id.*

229. Particularly striking was Rehnquist's statement that "the *Lemon* test has never been binding on the Court." *Id.* at 112.

230. *See id.* at 113–14.

> It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. . . . Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any . . . "endorsement" of prayer.

*Id.*

231. 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part and joined by Rehnquist, C.J., and White and Scalia, JJ.).

232. *Id.* at 660; *cf. id.* at 659.

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so.

*Id.* (internal quotation marks omitted); Board of Educ. of the Westside Community Schs. v. Mergens, 496 U.S. 226, 247–52, 260–62 (1990) (same).

The Chief Justice's decision to join Kennedy's opinion is interesting in view of the significant differences between the coercion test and the nonpreferentialist approach the Chief Justice defended in *Wallace v. Jaffree*. *See* McConnell, *Coercion*, *supra* note 32, at 936 ("It is easy to imagine forms of nonpreferential aid, short of establishing a national church, that nonetheless would have the effect of coercing a religious observance."). The Chief Justice's willingness to join Kennedy's opinion suggests that he is interested not so much in the details of the test, or its complete fidelity to the history he invokes in *Wallace*, as in ensuring simply that the governing test would invalidate only a vety few governmental actions.

criticism" of the *Lemon* framework[233] and the fact that some of the Court's cases had rejected his coercion theory,[234] Kennedy suggested that "[s]ubstantial revision of our Establishment Clause doctrine may be in order."[235] That task of revision, Kennedy said, was "unnecessary to undertake" in *Allegheny*.[236] But while Kennedy was "content for present purposes to remain within the *Lemon* framework," he noted pointedly that he did "not wish to be seen as advocating, let alone adopting, that test as [the] primary guide."[237] Kennedy's rejection of O'Connor's endorsement test was more definitive: He described it as "novel," "flawed in its fundamentals and unworkable in practice,"[238] insufficiently respectful of longstanding historical practice,[239] "trivializ[ing]" of constitutional adjudication in its fact-specificity,[240] and tending in its application to favor larger over smaller denominations.[241]

Kennedy's coercion test had its moment in the spotlight in *Lee v. Weisman*,[242] when a majority of the Court joined his opinion invalidating, as unconstitutionally coercive, a clergy-led prayer at a public-school graduation.[243] The key to Kennedy's ability to gain a majority for this approach lay in the retirement of Justice Marshall at the end of the preceding Term.[244] With the ascension of Justice Thomas to the Court, only four Justices remained who were committed to either the *Lemon* or the endorsement approach.[245] That put Kennedy in a powerful position. He authored the Court's opinion, and the other four members of the *Lee* majority signed it, writing separately to note that the same result could be reached on either *Lemon* or endorsement grounds.[246]

233. *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

234. *See id.* at 661.

235. *Id.* at 656.

236. *Id.*

237. *Id.* at 655.

238. *Id.* at 669.

239. *See id.* at 669–74.

240. *Id.* at 674; *see also id.* at 674–76.

241. *See id.* at 677. *But see* McConnell, *Religious Freedom*, *supra* note 32, at 162–65 (arguing that there may be little practical difference between Kennedy's and O'Connor's tests, though Kennedy's is probably slightly narrower).

242. 505 U.S. 577 (1992).

243. *See id.* at 599.

244. *See* Paulsen, *supra* note 32, at 819 n.97.

245. Justices Blackmun, Stevens, O'Connor, and—it turned out—Souter.

246. *See Lee*, 505 U.S. at 604 (Blackmun, J., concurring) (arguing that "proof of government coercion is not necessary to prove an Establishment Clause violation" and finding the challenged prayer to violate both *Lemon* and endorsement principles); *id.* at 609 (Souter, J., concurring) (rejecting Rehnquist's nonpreferentialist theory; arguing that coercion, "over and above state endorsement of religious exercise or belief," is not a "necessary element of an Establishment

But the coercion test's victory in *Lee* was at best equivocal. Presumably to secure the votes of the four Justices who joined him as to the outcome, but not as to the desirability of the coercion test, Kennedy expressly refused the solicitor general's request that *Lemon* be overruled.[247] And given the position of his fellow majority members, Kennedy did not have the votes both to establish that the coercion test was the reigning Establishment Clause standard and to invalidate the challenged prayer.[248] Instead, he wrote, whatever "the definition and full scope"[249] of the Establishment Clause might be, the Clause guarantees "at a minimum . . . that government may not coerce anyone to support or participate in religion or its exercise."[250]

Kennedy's conclusion that the prayer challenged in *Lee* involved "indirect coercion,"[251] and his reliance on social-psychological theories of "peer pressure,"[252] brought predictable scorn from Justice Scalia, joined by the Chief Justice and Justices White and Thomas.[253] Scalia, who had both authored an earlier opinion critical of the purpose part of the *Lemon* test[254] and signed Kennedy's announcement of the coercion theory in *Allegheny*,[255] made clear in his *Lee* dissent that he would support *Lemon*'s overruling. Indeed, he suggested that the Court's failure to apply *Lemon* in *Lee* might have signaled *Lemon*'s demise already: "[T]he interment of that case," Scalia wrote, "may be the one happy byproduct of the Court's otherwise lamentable decision."[256]

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Clause violation"; and finding forbidden endorsement). Justices Stevens and O'Connor joined both the above concurrences.

247. *Id.* at 586–87 (opinion of the Court).

248. As Michael Stokes Paulsen points out, he did have five votes to adopt the coercion test and five votes to invalidate the prayer. *See* Paulsen, *supra* note 32, at 824–25. But the four Justices who joined as to the outcome did not accept the coercion theory, and the four who agreed with the coercion theory disagreed with Kennedy as to the outcome.

249. *Lee*, 505 U.S at 586.

250. *Id.* at 587.

251. *Id.* at 592.

252. *Id.* at 593–94.

253. *See id.* at 631–46 (Scalia, J., dissenting). Still, Paulsen, who defends the coercion test, agrees with Kennedy as to the result in *Lee*. *See* Paulsen, *supra* note 32, at 820 n.100, 821, 828–31. Paulsen disagrees, however, with Kennedy's invocation of indirect coercion and peer pressure. *See id.* at 832–38.

254. *See* Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting).

255. *See* County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

256. *Lee*, 505 U.S. at 644.

But *Lemon* was not yet dead.[257] In the *Lamb's Chapel v. Center Moriches Union Free School District*[258] case the next Term, the Court invoked *Lemon* in rejecting a school district's defense that it was required by the Establishment Clause to deny after-school access by a religious group. Scalia responded:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . . Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* . . . conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it.[259]

Scalia went on to note that six (now five[260]) sitting Justices had written or signed opinions criticizing *Lemon*.[261] And he vowed for the future: "I will decline to apply *Lemon*—whether it validates or invalidates the government action in question."[262] Scalia noted further that he could not join the Court's opinion in *Lamb's Chapel* because of its suggestion that endorsement was an Establishment Clause standard.[263]

But despite the general dissatisfaction with *Lemon*, the very proliferation of alternative tests had prevented a majority of Justices from agreeing upon any particular *Lemon*-replacing standard. The issue of *Lemon*'s status remained unsettled. The Court seemed to be temporizing, deciding the *Zobrest* case, for example, by employing the particularized categories developed under *Lemon*'s aegis, but studiously avoiding, to the extent possible, reference to *Lemon* itself.

When the Justices next addressed the issue of *Lemon*'s status, they did so in a context that, on one point, encouraged greater agreement among those who had criticized *Lemon*. The case was *Kiryas Joel*, and the point on which *Lemon*'s critics agreed was that, at a minimum, the *Lemon*-following

257. *Cf.* Paulsen, *supra* note 32, at 821–25 (arguing that *Lemon* is dead and the coercion test has replaced it). Paulsen likely would have been right, had Justice White, the fifth member of the *Lee* "doctrinal majority" that favored the coercion test, *id.* at 825, not retired at the end of the Term. *See id.* at 862 (recognizing the effect that White's departure might have on "The Coercion Five").

258. 508 U.S. 384 (1993).

259. *Id.* at 398 (Scalia, J., concurring in the judgment) (citation omitted).

260. The number went from six to five with Justice White's retirement.

261. *See Lamb's Chapel*, 508 U.S. at 398–99 (Scalia, J., concurring in the judgment).

262. *Id.* at 399–400.

263. *See id.* at 400. Justice Thomas joined Scalia's opinion, and Justice Kennedy stated his agreement on both points that Scalia mentioned: "[T]he Court's citation of *Lemon*," as well as its "use of the phrase 'endorsing religion,'" was "unsettling and unnecessary." *Id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment).

decisions in *Ball* and *Aguilar* should be overruled. This agreement, it will turn out, gave the Court at least a modest agendum for transforming Establishment Clause doctrine—the agendum pursued, three years later, in *Agostini*.

C. *Kiryas Joel* and the Justices' Law-Transforming Agenda

The *Kiryas Joel* case arose out of attempts to provide special education services to the handicapped children of the Satmar Hasidim, a sect of Hasidic Jews who had established a religious enclave in Orange County, New York.[264] The enclave, a 320-acre village within the town of Monroe, was occupied entirely by Satmars. The Satmars' practice was to avoid assimilation into the surrounding community and to educate their children in religious schools. These schools, however, did not provide services for handicapped children. Instead, the Monroe-Woodbury Central School District offered such services at an annex to one of the religious schools until, after *Aguilar* and *Ball*, the district terminated that arrangement. The affected Satmar children then enrolled in the Monroe-Woodbury public schools, but assimilation into the secular world proved too traumatic and disorienting. In response to the plight of these Satmar children, the New York legislature created a special school district, coextensive with the village of Kiryas Joel, that could provide special education for the handicapped children of the Satmar community.[265] The Court, in the *Kiryas Joel* case, declared the creation of this school district unconstitutional.

Thus although neither *Ball* nor *Aguilar* figured in the reasoning that decided *Kiryas Joel*, they were the decisions that had prompted the legislative act declared unconstitutional. That connection provided the occasion for the critical comments directed at *Ball* and *Aguilar* in three of the *Kiryas Joel* opinions. Each opinion noted that the case would not have arisen but for *Ball* and *Aguilar*; each asserted, or at least strongly suggested, that those decisions were mistaken and should be overruled.

Justice O'Connor stated her belief that the arrangement terminated in response to *Aguilar* was entirely constitutional:

> The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion.

264. I take this account of the facts in *Kiryas Joel* from the Court's opinion. *See* Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 690–93 (1994).

265. Political pressures, too, likely motivated the legislature. *See* Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 118–19 (1996) (detailing the political influence of village leaders and concluding that the creation of the special school district "showed all the marks of insider politics").

> All handicapped children are entitled by law to government-funded special education. . . . If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well.
>
> I thought this to be true in *Aguilar*, . . . and I still believe it today. The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools. . . . It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here. The Court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, toward religion.[266]

Although Justice O'Connor spoke of "reconsider[ing]" *Aguilar*, her remarks made plain enough that she meant "reconsider and overrule."

Justice Kennedy noted that the problem considered in *Kiryas Joel* was "attributable in no small measure to what I believe were unfortunate rulings by this Court."[267] He elaborated:

> The decisions in *[Ball]* and *Aguilar* may have been erroneous. In light of the action before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them at a later date. . . . But for *[Ball]* and *Aguilar*, the Satmars would have had no need to seek special accommodations or their own school district. Our decisions led them to choose that unfortunate course, with the deficiencies I have described.[268]

Still, Kennedy concluded, "[o]ne misjudgment is no excuse . . . for compounding it with another. We must confront this litigation as it comes before us, without bending rules to free the Satmars from a predicament into which we put them."[269]

Justice Scalia, joined by the Chief Justice and Justice Thomas, noted Kennedy's and O'Connor's criticisms of *Ball* and *Aguilar*. "I heartily agree," Scalia wrote, "that these cases, so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity. . . ."[270]

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266. *Kiryas Joel*, 512 U.S. at 717–18 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor mentioned *Aguilar* also in the course of discussing the *Lemon* test's shortcomings as a "unitary test," *id.* at 719: "'Entanglement' is discovered in public employers monitoring the performance of public employees—surely a proper enough function—on parochial school premises, and in the public employees cooperating with the school on class scheduling and other administrative details." *Id.* (citing Aguilar v. Felton, 473 U.S. 402, 413 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997)).

267. *Id.* at 730 (Kennedy, J., concurring in the judgment).

268. *Id.* at 731.

269. *Id.* at 731–32.

270. *Id.* at 750 (Scalia, J., dissenting).

The statements of these five Justices indicated that the Court had set itself at least a limited agendum for transforming Establishment Clause law: overrule *Ball* and *Aguilar*. The question, though, was under what framework? Would the Court go further and overrule *Lemon* as well? And if so, could the Court reach agreement on a test to replace *Lemon*?

Justice O'Connor's *Kiryas Joel* concurrence addressed these questions, though her answers were far from clear. On one hand, she seemed no longer to understand her own approach as merely a "clarification" of *Lemon*.[271] Understood as a "unitary" Establishment Clause standard, she said, *Lemon* had "with some justification" been criticized as "so vague as to be useless."[272] While the impulse toward "a single test, a Grand Unified Theory that would resolve all the cases" is in one sense "appealing,"[273] O'Connor wrote, at the same time the use of *Lemon* as unitary standard had directed the Court's attention away from relevant differences among various Establishment Clause contexts.[274] It had led the Court, further, to create an increasingly arcane set of distinctions that had "deform[ed] the language of the test" and had departed from everyday understandings of the relevant *Lemon* terms (such as "primary effect" and "entanglement").[275] The "bad test," O'Connor suggested, had begun to "drive out the good," and by the "good" tests she meant inquiries that were "narrower" and more "precise" than the "bad," "broad," "amorphous and distorted" *Lemon* test.[276] For these reasons, O'Connor seemed to say farewell to *Lemon*. "[T]he slide away from *Lemon*'s unitary approach is well under way," O'Connor wrote, and "[a] return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions."[277]

But what, in O'Connor's view, should replace *Lemon*? One might have thought, before reading her criticism of "unitary" frameworks, that her answer would be the endorsement test. Yet neither could that test, O'Connor indicated, provide a "unitary" approach valid in all Establishment Clause contexts.[278] The endorsement test, she suggested in *Kiryas*

271. This was her characterization of the endorsement test when she introduced it in *Lynch*. *See supra* note 216 and accompanying text.

272. *Kiryas Joel*, 512 U.S. at 718–19 (O'Connor, J., concurring in part and concurring in the judgment).

273. *Id.* at 718.

274. *See id.*

275. *Id.* at 719.

276. *Id.* at 720.

277. *Id.* at 721.

278. Christopher Eisgruber points out that O'Connor may always have understood endorsement principles as something other than a unitary test. As Eisgruber observes, she applied the endorsement test in cases involving "public sponsorship of religious displays and observances," but

*Joel*, was most appropriate for "[c]ases involving government speech on religious topics," such as the cases involving religious holiday displays on government property.[279] In other contexts, however—such as the *Kiryas Joel* context itself, in which the question involved "[g]overnment delegations of power to religious bodies"—other non-*Lemon*, nonendorsement principles would be appropriate.[280] While perhaps one day "a unified, or at least more unified" test might "distill" from future cases, until then, she said, a plurality of more fact-specific tests would be appropriate.[281] Establishment Clause law, O'Connor concluded, "will better be able to evolve . . . [if] freed from the *Lemon* test's rigid influence" and "distorted framework."[282] Yet for O'Connor, "abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it."[283]

Justice Scalia could not let O'Connor's remarks on *Lemon* go without comment. Scalia might have been encouraged by O'Connor's sharper criticisms of, and past-tense references to, the *Lemon* approach. But the suggestion that it be abolished and "replace[d] . . . with nothing," or at least nothing more than "a series of situation-specific rules," only recapitulated the error of *Lemon*:

> The problem with (and the allure of) *Lemon* has not been that it is "rigid," but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire. . . . To replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle.[284]

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not in *Ball* or *Aguilar*—decided one year after she had announced the endorsement test. *See* Eisgruber, *supra* note 32, at 1310–11.

279. *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment) (citing, inter alia, County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984)); *see also* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (applying the endorsement test, post-*Kiryas Joel*, in a case involving the Klu Klux Klan's request to display a cross on a statehouse plaza).

280. *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring in part and concurring in the judgment).

281. *Id.* at 721; *cf.* Eisgruber, *supra* note 32, at 1304–12 (defending a modified version of the endorsement test for cases involving "official prayers and publicly sponsored religious displays").

282. *Kiryas Joel*, 512 U.S. at 721 (O'Connor, J., concurring in part and concurring in the judgment).

283. *Id.*

284. *Id.* at 751 (Scalia, J., dissenting) (citation omitted).

The "principle" with which Scalia would replace *Lemon* was "fidelity to the longstanding traditions of our people."[285] This Establishment Clause inquiry, Scalia insisted, would not (unlike O'Connor's "evolving" standards) leave the Court to its "own devices."[286]

For present purposes, then, *Kiryas Joel* is significant in three respects. First, it made explicitly clear that a majority of the Justices were prepared, at a minimum, to overrule *Aguilar* and significant parts of *Ball*. Second, after O'Connor's *Kiryas Joel* concurrence, five Justices now were on record clearly opposing not just the way in which *Aguilar* and *Ball* had applied *Lemon* principles, but the *Lemon* framework itself—at least when understood as a "unitary test." But third, the difference between the O'Connor and Scalia opinions in *Kiryas Joel* made clear that the five Justices most interested in transforming Establishment Clause law still had not settled upon a *Lemon*-replacing standard. The Court had agreement on one limited agendum of transformation, but not on the broader principles by which Establishment Clause doctrine should be transformed.

### D. Response to the *Kiryas Joel* Invitation

*Kiryas Joel*'s pointed statements about *Ball* and *Aguilar* read like an invitation for a request that those cases be overruled. Perhaps the five Justices who issued that invitation intended to address it to the New York legislature or to local Kiryas Joel officials, who could have responded to the Court's invalidation of the special school district by reinstituting the original plan terminated because of *Ball* and *Aguilar*.[287] But the invitation was answered instead by the New York City Board of Education, still operating under the twelve-year-old injunction entered in *Aguilar*. Just shy of one year after the Court's *Kiryas Joel* decision, the board authorized its counsel to seek *Aguilar*'s reconsideration. The form in which the board sought relief was a motion, under Rule 60(b) of the Federal Rules of Civil Procedure, for relief from the *Aguilar* judgment. The board invoked, in particular, clause (5) of the Rule, which provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.—

285. *Id.*

286. *Id.* *But see* Paulsen, *supra* note 32, at 839–41 (criticizing, as a "classic example of result-oriented reasoning," the idea "that a legal test must be wrong if it would invalidate longstanding traditional practices").

287. The legislature did respond, but to another "invitation . . . within the Court's opinions." Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 404 (1995). The legislature drafted a statute authorizing municipalities generally to secede from school districts and form their own districts. *See id.* at 404–05.

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . [when]:
>
> . . . .
>
> (5) . . . it is no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time . . . .[288]

In seeking relief under Rule 60(b)(5), the board relied on the Supreme Court's gloss in *Rufo v. Inmates of Suffolk County Jail*:[289] Relief from an injunction is appropriate if the moving party can show "a significant change either in factual conditions or in the law."[290] The board's argument for a "significant change . . . in the law" depended, the district court recognized, "most heavily on the opinions in *Kiryas Joel*."[291] Although the board argued that the district court itself had authority to "pronounce *Aguilar* dead" and to grant relief from the judgment,[292] the court interpreted this argument to seek, "at bottom," only a "procedurally sound vehicle to get the issue back before the Supreme Court."[293]

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288. FED. R. CIV. P. 60(b)(5).

289. 502 U.S. 367 (1992).

290. *Id.* at 384; *see also id.* at 388 ("[M]odification . . . may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent."). *Rufo* speaks in terms of a consent decree rather than an injunction, but the statement applies to both kinds of order. *See* Agostini v. Felton, 117 S. Ct. 1997, 2006 (1997); *see also* System Fed'n No. 91 v. Wright, 364 U.S. 642, 647 (1961) ("There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.").

291. Felton v. United States Dep't of Educ., No. 78-CV-1750 (E.D.N.Y. May 20, 1996) (unpublished memorandum and order), *reprinted in* Petition for a Writ of Certiorari, Appendix at 15, *Agostini*, 117 S. Ct. at 1997 (No. 96-552); *see also Agostini*, 117 S. Ct. at 2006 (arguing that the law had changed, the board "pointed to the statements of five Justices in [*Kiryas Joel*] calling for the overruling of *Aguilar*").

Although the board relied, also, on other post-*Aguilar* Supreme Court decisions, its submission to the district court made clear that the Court's *Kiryas Joel* opinions were what prompted its request for a reconsideration of *Aguilar*. This connection is evident in the way the board replied to the argument that its motion was not filed "within a reasonable time," as Rule 60(b)(5) requires. The board had "acted as expeditiously as could reasonably be expected," it said, given the difficulties of the issues, both legal and political. *Felton*, No. 78-CV-1750, *reprinted in* Petition for a Writ of Certiorari, Appendix at 19, *Agostini*, 117 S. Ct. at 1997. The clear implication is that the event the board needed to "digest and discuss," *id.* at 18, and to which it responded "as expeditiously as could reasonably be expected," was the Court's decision just less than a year before in *Kiryas Joel*.

292. *See Felton*, No. 78-CV-1750, *reprinted in* Petition for a Writ of Certiorari, Appendix at 17, *Agostini*, 117 S. Ct. at 1997.

293. *Id.* The federal secretary of education supported the board's underlying legal position but argued that only the Supreme Court had authority to declare *Aguilar*'s demise:

> [T]he Secretary states that although the motion cannot be granted, "we should not be understood to suggest that a reconsideration of [*Aguilar*] would be inappropriate in the Supreme Court. . . . We preserve our right to support a request by the [Board] that the Supreme Court reconsider its ruling in this case."

*Id.* at 17 n.3.

The district court acknowledged that Rule 60(b) responds to competing concerns. On one hand, the rule is designed to do justice in particular cases, when the circumstances that once justified the original judgment have changed. On the other hand, application of the rule must respect also the principle of finality, and for that reason, "Rule 60(b) may not be used as a substitute for appeal."[294] The court resolved this tension in favor of the board. "[T]here could have been no further appeal from the adverse decision by the Supreme Court in 1985," the court pointed out, and "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now."[295] In these circumstances, the district court concluded, "allowing the defendants to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done."[296] For these reasons, the district court held, the board's Rule 60(b)(5) motion was "procedurally firm."[297]

The district court, however, proceeded to deny the motion on the merits. The court stated:

> There may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred. More importantly, it is not so certain an event that this Court could properly anticipate it by affording the relief sought here. However, it does seem clear to me that the Board should be permitted to seek the reconsideration of *Aguilar* that a majority of the Supreme Court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.[298]

The Second Circuit affirmed without opinion, "substantially for the reasons stated" in the district court's memorandum and order.[299] The board, joined

294. *Id.* at 18.

295. *Id.*; *see also id.* at 16 (stating that "[t]he life expectancy of *Aguilar* itself is, to put it mildly, subject to question," and citing the various opinions in *Kiryas Joel*).

296. *Id.* at 18.

297. *Id.* at 19. The district court also held that the law of the case doctrine did not apply because, under Second Circuit precedent, the doctrine was "limited by discretion and should be discarded for a compelling reason such as an intervening change of law . . . ." *Id.* at 18 (internal quotation marks omitted).

298. *Id.* at 19. The district court noted also that challenge under Rule 60(b)(5) was "far preferable to contemptuously defying the injunction by placing teachers back in the parochial schools, the course that, according to counsel for plaintiffs at oral argument, is the only proper means of obtaining appellate review of the continuing validity of the injunction." *Id.*

299. Felton v. United States Dep't of Educ., Nos. 96-6160, 96-6180, 96-6181, 1996 U.S. App. LEXIS 22981, at *2 (2d Cir. Aug. 30, 1996).

by a group of parochial school parents who wanted Title I services restored on-premises, and also by the federal secretary of education, petitioned for certiorari and asked the Court to overrule *Ball* and *Aguilar*.

For reasons I suggest in Part IV, the prudent course of action—even from the point of view of the five Justices committed to overruling *Ball* and *Aguilar* and revising Establishment Clause doctrine—would have been for the Court to deny review. The Rule 60(b) context, I argue, kept the Court from getting a clear shot at *Ball* and *Aguilar* in particular, and kept it from being able to reform Establishment Clause law more generally.

But perhaps impatient to reach the issues it had flagged two-and-one-half years before, the Court granted certiorari in the case, now captioned *Agostini v. Felton*,[300] and pursued its transformation of Establishment Clause law in that case's inhospitable context.

## III. *AGOSTINI*: FINDING A CHANGE IN THE LAW

### A. The Rule 60(B)(5) Problem

Thus, by the time the Court considered *Agostini*, five Justices had come to agree that *Aguilar* and significant parts of *Ball* should be overruled, and they agreed also that the principles governing this school-aid branch of Establishment Clause doctrine should be revised. They agreed, further, that the *Lemon* test was no longer satisfactory—though they disagreed as to what test should replace it.

Had the Court undertaken its law-reform activities in a case untroubled by *Agostini*'s Rule 60(b)(5) complications, it would have had a relatively free hand in completing its most particular project: overruling *Ball* and *Aguilar*. Toward this end, any of the various theories that had come to compete with *Lemon* would have sufficed—whether Justice O'Connor's endorsement test, Justice Kennedy's coercion test, or the tests defended by the Chief Justice and Justices Scalia and Thomas. Alternatively, without definitively adopting one of these tests, the Court could have explained that the principles of the *Mueller*, *Witters*, and *Zobrest* line of *Lemon*-inspired cases should be extended in the way I suggested above[301]—by taking the principle of a program's generality and neutrality, and the mediating role of private decision making, to be sufficient conditions for

300. 117 S. Ct. 759 (1997). The first-named member of the parents' group that sought relief from the *Aguilar* injunction was Rachel Agostini, replacing Yolanda Aguilar—thus the case's changed name.

301. *See supra* notes 200–205 and accompanying text.

the program's constitutionality.[302] Or the Court could have postponed adoption of a definitive, *Lemon*-replacing test, holding only that *Ball* and *Aguilar* were wrongly decided under any of the theories that competed with *Lemon*. In short, if the Court had reconsidered *Ball* and *Aguilar* outside of the Rule 60(b) context, it could have overruled those cases unproblematically, even if no single Establishment Clause test could have commanded a majority's allegiance.

The Rule 60(b)(5) context, however, complicated the Court's law-transforming strategy immensely. That Rule sharply limited the Court's freedom to adopt a *Lemon*-replacing test, and it restricted even the Court's ability to overrule *Aguilar* and *Ball*. As the Court acknowledged, the change in the law that could justify relief under Rule 60(b)(5) had to *precede* the Court's decision in *Agostini*—or, as the Court put it, *Agostini* could only "recogniz[e]" a change in the law worked by pre-*Agostini* cases; it could not itself "effect[]" that change.[303] The Court, therefore, could not decide simply that, from its present perspective, it would like to change the law and overrule *Ball* and *Aguilar*. Instead, the Court had to parse its decisions post-*Aguilar* and pre-*Agostini* to determine whether any of those decisions had, in the Court's phrase, *already* "so undermined *Aguilar* that it is no longer good law."[304]

This task of searching the Court's precedents for a law-changing decision was not easy. The most obvious candidate was *Kiryas Joel*—the only case in which a majority of Justices had criticized either *Ball* or *Aguilar*. Yet, relying on the distinction between holding and dictum, the Court noted that "the question of *Aguilar*'s propriety was not before" the Court in *Kiryas Joel*. Accordingly, "[t]he views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law."[305] The next most obvious candidates were the cases in the *Mueller* to *Zobrest* line. These, indeed, were the cases in which the Court, in *Agostini*, chose to find the required change in the law. As my earlier discussion of those cases already has suggested, however, the decisions in the *Mueller* to *Zobrest* line certainly do not explicitly overrule *Ball* and *Aguilar*, but instead distinguish them and operate within the same *Lemon* framework. The *Mueller* line provides opportunity for a Court interested in changing the law, but finding them *already* to have changed the law, I argue, is untenable.[306]

302. *See supra* notes 202–205 and accompanying text.
303. Agostini v. Felton, 117 S. Ct. 1997, 2018 (1997) (emphasis omitted).
304. *Id.* at 2007.
305. *Id.*
306. *See infra* Part IV.A.

The Rule 60(b)(5) context presented the Court with an additional difficulty. The Court in *Agostini* was reviewing the Second Circuit's affirmance of a district court judgment denying relief. The basis for the lower courts' action was that *Aguilar* was the controlling Supreme Court precedent—it was, after all, a ruling in the very same case, not yet overruled by the Court. To reverse the Second Circuit's decision, one would think, the Court would have to determine that the lower courts erred in denying relief. That, however, would seem to mean that the lower courts had power to determine that *Aguilar*, an obviously applicable Supreme Court case not expressly overruled, was so undermined by subsequent Court decisions as to be no longer good law. And the Court had disavowed that possibility eight years earlier, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[307] In *Rodriguez de Quijas*, the Court had said that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[308] The combination of the Rule 60(b)(5) context, together with the *Rodriguez de Quijas* stricture, ensnared the Court in an insoluble paradox.[309]

The Court recognized these difficulties, at least in some measure, from the outset. In granting certiorari, the Court, sua sponte, asked the parties to brief not just the merits questions, but also the question "'[w]hether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief Petitioner seeks.'"[310] In the following sections, I sketch the Court's argument that post-*Aguilar* and pre-*Agostini* cases undermine *Ball* and *Aguilar*, then turn to the way in which the Court tries to answer the Rule 60(b)(5) question.

### B. The Court's Theory of Post-*Aguilar* Legal Change

The Court began its account of post-*Aguilar* legal change by acknowledging a general continuity with the *Lemon* framework: The "general principles" of Establishment Clause doctrine, the Court maintained, "have not changed since *Aguilar* was decided."[311] The Court still inquires whether the challenged statute or program has the purpose or effect of advancing or inhibiting religion, and the purpose part of the *Lemon* inquiry "has

307. 490 U.S. 477 (1989).
308. *Id.* at 484.
309. *See infra* Parts IV.B–C.
310. Agostini v. Felton, 117 S. Ct. 759, 759 (1997) (mem. granting cert.).
311. Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).

remained largely unchanged."[312] But "[w]hat has changed since . . . *Ball* and *Aguilar*," the Court said, "is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."[313]

As the Court recognized, whether the law has changed in this respect since *Ball* and *Aguilar* depends upon what those cases are taken to hold. On the Court's reading in *Agostini*, *Ball*'s conclusions of impermissible effect

> rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.[314]

The Court's holding in *Aguilar* added a "fourth assumption": "that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion."[315] These four "assumptions," the Court said in *Agostini*, were the basis for the judgments in *Aguilar* and *Ball*. And according to the Court, "more recent cases"—post-*Aguilar* and pre-*Agostini*—had so "undermined"[316] these assumptions that "*Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law."[317]

The post-*Aguilar* decisions on which *Agostini* relied were *Witters*[318] and *Zobrest*.[319] *Zobrest*, the Court maintained in *Agostini*, undermined *Aguilar*'s first two assumptions—concerning state-sponsored indoctrination and symbolic union. On the indoctrination issue, *Agostini* emphasized *Zobrest*'s statement that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school."[320] In this pronouncement, *Agostini* reasoned, *Zobrest* "expressly rejected the notion—relied on in

312. *Id.* The Court does not mention *Lemon* expressly in this context, but it does cite cases that employed the *Lemon* purpose inquiry.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 2016.

318. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

319. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). On the Court's decisions in *Witters* and *Zobrest*, see discussion *supra* Part II.A.

320. *Id.* at 13, *quoted in Agostini*, 117 S. Ct. at 2010. *Zobrest* buttressed this claim by citing *Wolman*, which allowed public employees to perform speech and hearing diagnostic services on sectarian school premises. *See id.* at 13 n.10.

*Ball* and *Aguilar*—that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students."[321] In fact, according to the Court, *Zobrest* reversed the presumption: "In the absence of evidence to the contrary," the Court wrote in *Agostini*, "we assumed . . . that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said."[322] And further, through its silence on the point, *Zobrest* also "implicitly repudiated" the second "assumption" on which *Ball* and *Aguilar* turned—that "the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion."[323]

*Witters*, the Court said in *Agostini*, undermined the third "assumption" of *Ball* and *Aguilar*: The principle that direct aid to religious schools' educational function "impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking."[324] In fact, *Agostini* maintains, *Witters* upheld the challenged aid—a vocational-education grant to a blind student at a religious school—precisely *because* state funds reached the religious school only as a "consequence of private decisionmaking."[325] In so holding, *Agostini* noted, *Witters* emphasized two factors: the neutrality of the program's eligibility criteria, and the fact that the grant was paid directly to the student, who could choose the school—public or private, sectarian or nonsectarian—at which he would spend the grant. For these reasons, *Witters* held, "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[326] Accordingly, any religious indoctrination the grant recipient received would not be attributable to the state.[327]

*Zobrest*, the Court declared, was to similar effect. *Zobrest* attributed the challenged aid—i.e., "the interpreter's presence in a sectarian school"—not to state action, but instead to "the private decision of individual parents."[328]

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321. *Agostini*, 117 S. Ct. at 2011; *see also Zobrest*, 509 U.S. at 13 (noting that the interpreter was ethically bound to do no more than "accurately interpret whatever material is presented to the class as a whole").

322. *Agostini*, 117 S. Ct. at 2011.

323. *Id.*

324. *Id.* at 2010.

325. *See id.* at 2010–12.

326. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986), *quoted in Agostini*, 117 S. Ct. at 2012.

327. *See id.* at 488 ("[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.").

328. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993), *quoted in Agostini*, 117 S. Ct. at 2012.

*Zobrest* emphasized, further, that because the parochial school would not have paid for the interpreter on its own, absent the aid, the school was for that reason "not relieved of an expense that it otherwise would have assumed in educating its students."[329] The aid did not operate as an impermissible subsidy to religious activity. The *Agostini* Court thus understood both *Zobrest* and *Witters* to "depart[] from the rule relied on in *Ball*" that would invalidate all direct government aid to sectarian schools' "educational function."[330]

That left only *Aguilar*'s final "assumption": that the Title I program created an excessive entanglement "because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion."[331] The Court began its analysis of the entanglement issue by incorporating Justice O'Connor's suggestion, in her *Aguilar* dissent, that entanglement be treated as part of the effects inquiry, not as a separate test.[332] The Court's conclusion that programs like Title I do not effect an excessive entanglement followed from its rejection of *Ball*'s first "assumption." If public employees no longer are presumed likely to inculcate religion, then close monitoring of those employees no longer will be required.[333] Finally, *Agostini* concluded, the other forms of entanglement found in *Aguilar*—the need for administrative cooperation between government and religious schools, and the danger of political divisiveness—were not by themselves sufficient to invalidate a program on entanglement grounds.[334]

For the *Agostini* Court, then, the post-*Aguilar* decisions in *Zobrest* and *Witters* undermined the four crucial assumptions of *Ball* and *Aguilar* and changed "the criteria used to assess whether aid to religion has an impermissible effect."[335] That, however, is to say only that the *Ball* and *Aguilar* criteria are no longer in effect. Two questions remain. First, what are the new effects criteria? And under those criteria, is the *Aguilar* injunction no

329. *Id.* at 12.

330. *Agostini*, 117 S. Ct. at 2011.

331. *Id.* at 2010.

332. *Id.* at 2015 (noting the similarity of the factors considered in the effects and entanglement inquiries and concluding that "it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect"); *cf.* Aguilar v. Felton, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting) ("I question the utility of entanglement as a separate Establishment Clause standard in most cases."), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997); *id.* at 430 ("Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute which is alleged to violate the Establishment Clause . . . .").

333. *See Agostini*, 117 S. Ct. at 2015–16.

334. *See id.* at 2015; *cf. Aguilar*, 473 U.S. at 415–16 (Powell, J., concurring) (describing political divisiveness as a risk "additional" to the risk of entanglement).

335. *Agostini*, 117 S. Ct. at 2010.

longer legally correct? *Agostini* answers both questions by looking to the changes that, in the Court's view, *Zobrest* and *Witters* worked on *Ball*'s three effects inquiries.

According to *Agostini*, *Zobrest* and *Witters* changed, first, *Ball*'s government-indoctrination inquiry—in ways that demonstrate that New York's Title I program did not impermissibly indoctrinate. Whereas *Ball* and *Aguilar* presumed indoctrination, considering "the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant,"[336] the *Zobrest* Court searched the record for evidence of translator-introduced indoctrination.[337] In *Agostini*, the record disclosed no evidence that any New York City teacher had ever attempted to proselytize students in the Title I program's nineteen-year history.[338] Without such evidence, a conclusion of impermissible indoctrination would not follow.

Second, *Agostini* reiterated, *Zobrest* repudiated *Ball*'s presumption that the presence of Title I teachers on parochial school property creates a symbolic union of church and state. Even if the Title I program established a stronger connection between church and state than the mere presence of a public employee in a sectarian school, *Agostini* maintained, no court had found that Title I services may not be provided to sectarian-school students off premises.[339] Nor is the "difference in the degree of symbolic union between a student receiving remedial instruction in a classroom and one receiving instruction in a van parked just at the school's curbside" even "perceptible (let alone dispositive)."[340] New York City's Title I program therefore did not fail on symbolic-union grounds.

*Zobrest* further established, the Court said in *Agostini*, that New York City's Title I program did not "impermissibly finance" or subsidize religious instruction.[341] As in *Zobrest*, the services provided to religious-school students are "by law supplementary to the regular curricula," and thus they do not "'relievf[e] sectarian schools of costs they otherwise would have borne in educating their students.'"[342] According to the Court, the fact that New York City distributed Title I services to thousands of sectarian-school stu-

336. *Id.* at 2008–09. The Court did explain that the *Ball* Court "reason[ed] that potential witnesses to any indoctrination . . . might be unable to detect or have little incentive to report the incidents." *Id.* at 2009.

337. *See id.* at 2011.

338. *See id.* at 2012.

339. *See id.*; *see also id.* at 2015 (noting that *Aguilar*'s holding extended only to on-premises services and citing cases from the federal courts of appeals upholding off-premises delivery of Title I services to sectarian-school students).

340. *Id.* at 2012.

341. *Id.*

342. *Id.* at 2013 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993)).

dents, whereas *Zobrest* involved aid to only one such student, did not distinguish *Zobrest*.[343] Further, the Court maintained that "[w]hat is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off-campus, and *Aguilar* implied that providing the services off-campus is entirely consistent with the Establishment Clause."[344]

*Agostini* found *Zobrest* and *Witters* instructive in another respect, related to but distinct from the subsidization inquiry. Apart from the question whether a challenged program subsidizes a sectarian *institution* and its activities of indoctrination, *Agostini* maintained, *Zobrest* and *Witters* focused on whether the program gives potential *recipients* a financial incentive to undertake religious indoctrination. The Court observed that both *Zobrest* and *Witters*, as well as cases decided before *Ball* and *Aguilar*, had emphasized that the nature of a challenged program's eligibility criteria is relevant in this respect.[345] If "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *Agostini* explained, then potential recipients have no financial incentive to select religious activity.[346] Accordingly, *Agostini* concluded, "the aid is less likely to have the effect of advancing religion."[347]

*Zobrest* and *Witters* relied on this factor in upholding the programs challenged in those cases. *Ball* and *Aguilar*, by contrast, gave this factor "no weight."[348] On the facts of the *Agostini* case, the Court found, the Title I program, like the programs sustained in *Zobrest* and *Witters*, allocates aid "on the basis of criteria that neither favor nor disfavor religion."[349] Thus in this respect, too, the post-*Zobrest* effects test points toward the Title I program's constitutionality.

In concluding that the Title I program was constitutional under post-*Aguilar* cases, *Agostini* moved from its initial position—that the "assumptions" of *Ball* and *Aguilar* had been undermined—to a fuller account of the changes it believed *Witters* and *Zobrest* had worked on Establishment Clause doctrine. In the course of announcing its conclusion that New York's Title I program

343. *See id.* (quoting Mueller v. Allen, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.")).

344. *Id.*

345. *See id.* at 2014.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

was constitutional, the Court stated its post-*Zobrest* effects criteria as follows:

> New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement.[350]

Some aspects of this revised effects test are clear. For one thing, the Court has converted *Lemon*'s entanglement test from a separate inquiry, alongside purpose and effect, into a part of the effects test. Further, as mentioned, *Agostini* makes clear that only "institutional entanglement"—and that now means something more than routine administrative contacts or ordinary workplace supervision—will count as impermissible excessive entanglement. Also clear is the disappearance from the effects test of the symbolic-union theory on which *Ball* relied.[351] Further, *Agostini* makes apparent that the Court no longer will find an impermissible risk of government indoctrination whenever state-paid teachers or counselors work in the "pervasively sectarian" environment of a religious school. Finally, the Court's second effects criterion—that a program may not "define its recipients by reference to religion"—also seems clear (as well as easy for government to avoid).

In other respects, however, *Agostini*'s revised effects test is difficult to interpret. For example, the Court does not specify whether, as in the old *Ball* effects test, a plaintiff can prevail on effects, and thus prevail in the case, by prevailing on any of the three effects criteria. I assume, in the absence of any statement to the contrary in the *Agostini* opinion, that this is so.[352] Unclear, also, is what a plaintiff would have to show to demonstrate that the challenged program "result[s] in government indoctrination." The Court collapses, under the heading of "government indoctrination," two separate inquiries prescribed by *Ball*: the question whether public employees are likely themselves to engage in religious indoctrination, and the question whether government aid advances religion by subsidizing the educational function of sectarian schools.[353] I assume that a plaintiff may prevail on this effects criterion, and thus prevail in the case, by showing either. But the

350. *Id.* at 2016.

351. It seems to survive, however, in the form of the endorsement test, which in *Agostini* has an uneasy status alongside the purpose and effects tests. *See infra* notes 358–360 and accompanying text.

352. All of the factors are phrased in terms of effects that were prohibited under prior law, and the Court's opinion takes care to demonstrate that Title I violates none of the three criteria.

353. These were the two parts of the effects test that *Ball* had distinguished. *See supra* notes 160–162 and accompanying text.

criteria the Court prescribes for these two government-indoctrination factors are not at all clear.

*Agostini*'s discussion of the first government-indoctrination subcriterion—the participation of public employees in religious indoctrination, when this participation may be charged to the state—changes the *Ball* inquiry in two ways. First, as mentioned, *Agostini* insists upon genuine evidence that a public employee is likely to engage in religious indoctrination. Second, and potentially more important, *Agostini* emphasizes *Zobrest*'s point that even when public employees actually participate in religious teaching, the government nonetheless may not be responsible. In discussing this second point, *Agostini* relies upon *Zobrest*'s conclusion that, because the challenged program's eligibility criteria were neutral, the fact that James Zobrest received aid in a religious rather than a public school was a "'result of the private decision of individual parents'" and "'[could] not be attributed to *state* decisionmaking.'"[354]

The question after *Agostini* will be how broadly to interpret these notions of "neutral criteria" and "private decisionmaking." Any aid program can be outfitted with eligibility criteria that make aid "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[355] A comprehensive tuition voucher program, such as the one recently upheld by the Wisconsin Supreme Court,[356] is the most obvious example. If the neutrality of a program's eligibility criteria guarantees that the availability of aid to parochial schools is always the result of private, not state decision making—and that for that reason the resulting religious teaching is not attributable to the state—then any aid program whose eligibility criteria are neutral will survive the first part of the government-indoctrination inquiry.

What the Court means with its second criterion for impermissible government indoctrination—state subsidization of religious education—likewise is unclear. On one hand, *Agostini*'s account of the subsidization inquiry emphasizes the distinction between programs that "supplement" and those that "supplant" religious schools' existing curricula, and the Court seems to adopt, as a criterion of subsidization, *Zobrest*'s "relieve sectarian schools of costs they otherwise would have borne" formulation. The Court mentions also that "[n]o Title I funds ever reach the coffers of religious schools." If these are the subsidization criteria, then a voucher program

354. *Agostini*, 117 S. Ct. at 2012 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993)).

355. *Id.* at 2011 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

356. *See supra* note 202.

would subsidize religious schools impermissibly—both because state funds would reach religious schools' "coffers," and because the tuition grants likely would relieve religious schools of costs they otherwise would have borne. On the other hand, the Court could extend its "private decisionmaking" rationale to the issue of subsidization. In a voucher program, for example, if aid were available neutrally, on a per-pupil basis, the Court could maintain that government funds reach religious-school coffers only as a result of private, not state, decision making. The Court, then, would uphold the challenged program.

This latter interpretation of *Agostini*'s effects test is plausible, and it would allow the Court to uphold virtually any aid program with neutral eligibility criteria. But reading *Agostini* in this way leaves other features of the opinion unexplained. For example, if the subsidization test really does reduce to the issue whether the program's eligibility criteria are neutral, why would the Court have bothered to discuss the supplant/supplement distinction? And why would it emphasize that New York's Title I program did not relieve sectarian schools of costs they otherwise would have borne? Why, also, would the Court mention that no government funds reach religious schools' coffers? Why, for that matter, would the Court even suggest that subsidization was an issue separate from the issue of the program's neutrality?

In short, the Court leaves its revised effects test unclear—perhaps because of disagreements within the *Agostini* majority, perhaps in order to leave room open in later cases for further changes, and most likely for both reasons. The Court, in some future case—perhaps one involving a voucher program—will have to resolve the uncertainties of *Agostini*'s "current law."[357] The best that can be said for *Agostini*'s statement of current effects

357. Christopher Eisgruber and Lawrence Sager interpret the revised effects test similarly. They see in *Agostini* both a broad and a narrow rationale. The broad rationale lies in the Court's emphasis on the generality and neutrality of the program's eligibility criteria, and the two consequences the Court draws: (1) the program creates no incentive to undertake religious rather than secular education, and (2) the program channels benefits to religious schools only as a result of private decisions. As Eisgruber and Sager point out, if the Court takes these to be the decisive Establishment Clause criteria, then it would uphold, for example, a comprehensive voucher program that provides equal benefits to public- and private-school students. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 125–27. The narrower rationale, they say, emphasizes that New York's Title I program did not send money directly into religious-school coffers, nor did it relieve sectarian schools of costs they otherwise would have borne. If these features of Title I are a sine qua non for surviving an Establishment Clause challenge, Eisgruber and Sager argue, then a voucher program would be unconstitutional because "there is no doubt" that it would "add public money to the accounts of religious educational programs." *Id.*

law is that whatever the Court decides in the future will not be inconsistent with what the Court said in *Agostini*.

Alongside the revised effects inquiry the Court places the endorsement test. "The same reasons that justify" holding that New York City's Title I program survives the effects test, the Court wrote, "require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement."[358] The Court seemed to base this conclusion on its earlier position that the program established no symbolic union of church and state.[359] Perhaps Justice O'Connor had in mind also her earlier position about the endorsement test—that it expresses and specifies the purpose and effects parts of the *Lemon* inquiry.[360] But the Court did not make clear what relation it meant to establish between the endorsement test and the revised *Lemon* test.

The Court concluded: "[W]e must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law."[361] This conclusion, the Court maintained, removed any barrier that stare decisis might be thought to impose. Here the Court relied on the usual pro-overruling decisions and language, noting that "'*[s]tare decisis* is not an inexorable command,'"[362] and that the force of stare decisis is "at its weakest" in constitutional cases, in which the Court's decisions "can be altered only by constitutional amendment or by overruling."[363] In particular, the Court noted, various decisions have held that overruling is proper when intervening decisions have "'erod[ed]'" the precedent's "'underpinnings.'"[364] Accordingly, the Court announced, in a curious formulation: "We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause."[365]

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Daniel Farber, too, suggests that on the voucher question, after *Agostini*, "it would be far from impossible to write an opinion going either way." DANIEL A. FARBER, THE FIRST AMENDMENT 278 (1998).

358. *Agostini*, 117 S. Ct. at 2016.

359. *See supra* Part III.A.2 (discussing the Court's symbolic-union conclusion); *Agostini*, 117 S. Ct. at 2016 (citing, as support, one case finding no endorsement and another case finding no symbolic link).

360. *See supra* notes 215–223 and accompanying text.

361. *Agostini*, 117 S. Ct. at 2016.

362. *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

363. *Id.*

364. *Id.* (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)); *see also id.* at 2016–17 (citing other cases to the same effect).

365. *Id.* at 2017. For similar reasons, the Court decided that the law-of-the-case doctrine did not bar relief:

> The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." In light of our conclusion that *Aguilar*

## C. The Court's Treatment of the Rule 60(b)(5) Problem

The Court's journey did not end with its conclusion that *Aguilar* and the relevant parts of *Ball* were "no longer good law." One further obstacle remained—the question whether the New York City School Board, having demonstrated successfully a change in the law, could obtain relief under Rule 60(b)(5).

The difficulty, as I mentioned earlier, arose from the Court's decision in *Rodriguez de Quijas*.[366] If a Supreme Court precedent "has direct application in a case," the Court wrote in *Rodriguez de Quijas*, and "yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls."[367] Only the Supreme Court has "the prerogative of overruling its own decisions."[368] And when the district court acted in *Agostini*, *Aguilar* had "direct application": It was the Supreme Court's ruling in the very same case. Thus even if *Aguilar* "rest[ed] on reasons rejected" in *Witters* and *Zobrest*, as the Supreme Court later contended, still, *Rodriguez de Quijas* required the district court, and later the court of appeals, to follow *Aguilar* and deny relief. How, then, could the Supreme Court reverse the lower courts' decisions—particularly under the abuse-of-discretion standard that governs denial of Rule 60(b)(5) motions?[369] How could a decision that the Court acknowledged was correct[370] be an abuse of the district court's discretion?

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> would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply.

*Id.* (citations omitted). For support, the Court cited *Davis v. United States*, 417 U.S. 333, 342 (1974), in which the "Court of Appeals erred in adhering to [the] law of the case doctrine despite intervening Supreme Court precedent." *Agostini*, 117 S. Ct. at 2017. Reliance on *Davis* is odd: As we will see, the Court's theory in *Agostini* is that the lower court was correct in following *Aguilar* rather than the "intervening precedent[s]" of *Witters* and *Zobrest*. *See supra* notes 307–308 and accompanying text; *infra* Part III.B.

366. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); *see supra* notes 307–309 and accompanying text.

367. *Rodriguez de Quijas*, 490 U.S. at 484.

368. *Id.*

369. *See Agostini*, 117 S. Ct. at 2017–18 (acknowledging that the abuse-of-discretion standard applies).

370. *See id.* at 2017.

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484. Adherence to this teaching by the District Court and Court of Appeals in this case does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within

The Court answered these questions by reframing them. Its strategy was to make the Court's use of Rule 60(b)(5) look like a routine application of standard and settled legal principles. The Court's general practice, it said, is to "apply the rule of law we announce in a case to the parties before us."[371] The Court "adhere[s] to this practice," it said, even when it overrules a case on which the lower courts properly have relied.[372] The fact that *Agostini* arose in the Rule 60(b)(5) context, the Court suggested, did not take the case out from under these basic principles. While "the trial court has discretion" in deciding Rule 60(b)(5) motions, "the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained. . . . The standard of review we employ in this litigation does not therefore require us to depart from our general practice."[373] Because the controlling legal principles are those of *Zobrest* and *Witters*, not *Aguilar* and *Ball*, the district court's exercise of discretion could not be permitted to stand.

In framing its decision as a routine application of settled principles, the Court responded to arguments in Justice Ginsburg's dissent[374] that the Court's action was anything but routine. Unsurprisingly, the Court presented those arguments as pleas for an exception to general Rule 60(b)(5) principles.[375] Ginsburg's suggestion that the Court was "effecting" changes in the law, rather than "recognizing" them,[376] failed, the Court said, because the Court in fact had identified a "*bona fide*, significant change"[377] that *Zobrest* and *Witters* already had worked on the law. Further, because Rule 60(b)(5) applies, by its terms, only to judgments with prospective application, the

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its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.

*Agostini*, 117 S. Ct. at 2017.

371. *Id.* (citing *Rodriguez de Quijas*, 490 U.S. at 485).

372. *Id.* The Court's examples:

> In *Adarand Constructors, Inc. v. Pena*, for example, the District Court and Court of Appeals tejected the argument that racial classifications in fedetal programs should be evaluated under strict scrutiny, relying upon out decision in *Metro Broadcasting, Inc. v. FCC*. When we granted certiorari and overruled *Metro Broadcasting*, we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time. See also *Hubbard v. United States* (overruling decision relied upon by Court of Appeals and reversing the lower court's judgment that relied upon the overruled case).

*Id.* (citations omitted).

373. *Id.* at 2018 (citations omitted).

374. *Id.* at 2026 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.).

375. *See id.* at 2018 (opinion of the Court) ("Respondents nevertheless contend that we should not grant Rule 60(b)(5) relief here, in spite of its propriety in other contexts.").

376. *See id.* at 2028 (Ginsburg, J., dissenting).

377. *Id.* at 2018 (opinion of the Court).

Court's decision would "have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue."[378] For these reasons, the Court maintained, fears of a "deluge of Rule 60(b)(5) motions" were unfounded, and Justice Ginsburg's pointed concern that litigants would be encouraged to "'speculat[e] on chances from changes'"[379] in the Court's membership was, the Court said, "overstated."[380]

The Court replied also to Justice Ginsburg's observation that other cases already in the Court's pipeline might present the issue of whether to overrule *Aguilar*, but without the complications that *Agostini*'s Rule 60(b)(5) context created.[381] The Court rebuffed Ginsburg's implication that the Court had departed from "integrity in the interpretation of procedural rules"[382] with the assertion that "Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here."[383] The Court

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378. *Id.* The Court cited here *Teague v. Lane*, 489 U.S. 288 (1989), which limits the ability of federal habeas corpus petitioners to take advantage of favorable "new rules" announced after their convictions have become final. Nothing in *Agostini*, the Court was suggesting, would change the Court's usual practice of treating cases whose outcomes were not "dictated by precedent," *see, e.g.*, *id.* at 301, as cases that establish "new rules" unavailable to habeas petitioners (except in rare and exceptional situations). The Court's sensitivity to the possibility that *Agostini* might be read to modify existing habeas corpus jurisprudence might help explain its insistence, at the opening of the opinion, that post-*Aguilar* cases "dictate" the conclusion that "*Aguilar* is no longer good law." *Agostini*, 117 S. Ct. at 2003.

379. *Agostini*, 117 S. Ct. at 2018 (quoting *id.* at 2028 (Ginsburg, J., dissenting)). In referring to changes in the Court's personnel, Justice Ginsburg presumably had in mind the fact that Justice Stevens was the only member of *Ball*'s and *Aguilar*'s five-member majorities still on the Court. *See id.* at 2026 (Ginsburg, J., dissenting).

380. *Id.* at 2018 (opinion of the Court).

381. *Id.*; *see also id.* at 2026, 2028 (Ginsburg, J., dissenting) (mentioning cases pending in the lower courts).

382. *Id.* at 2028 (Ginsburg, J., dissenting). Justice Ginsburg emphasized that *Aguilar* had not been overruled before the Court's *Agostini* decision. *See id.* at 2027; *id.* at 2028 ("[N]othing can disguise the reality that, until today, *Aguilar* had not been overruled. Good or bad, it was in fact the law."). "Lacking any rule or practice allowing us to reconsider the *Aguilar* judgment directly," Ginsburg wrote, "the majority accepts as a substitute a rule governing relief from judgments or orders of the federal trial courts." *Id.* at 2026. But this rule, Ginsburg argued, "had no office to perform in the District Court," given the Court's conclusion that *Aguilar* was still binding on lower courts. *Id.* at 2028. Accordingly, Ginsburg contended,

> [a]ll the lower courts could do was pass the case up to us. The Court thus bends Rule 60(b) to a purpose—allowing an "anytime" rehearing in this case—unrelated to the governance of district court proceedings to which the rule, as part of the Federal Rules of Civil Procedure, is directed.

*Id.* (citing FED. R. CIV. P. 1)

383. *Id.* at 2018 (opinion of the Court). I read the words "specifically contemplates" to be an ill-considered rhetorical flourish. Even if one agrees with the Court that its *Agostini* decision is permissible under Rule 60(b)(5), it can hardly be said that the Rule "specifically contemplates the grant of relief in the circumstances presented." The text of the rule, *see supra* text following note 287, speaks in general terms, authorizing relief from a final judgment when "it is no longer equitable that the judgment should have prospective application." Even the Court's decisions glossing

closed its opinion by invoking the plight of the City of New York and its affected children:

> [I]t would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause.[384]

## IV. MISMANAGING LEGAL CHANGE

The Court's opinion in *Agostini* marks the only path the Court could have taken to the conclusions it reaches: the Court's declaration that *Aguilar* and the relevant parts of *Ball* are no longer good law, and its ruling that relief under Rule 60(b)(5) is appropriate under *Agostini*'s circumstances. For reasons explained below, however, neither of the Court's conclusions is ultimately convincing. Even taking the Court's goal of overruling *Aguilar* and revising Establishment Clause doctrine as a fixed destination, I argue, both the Court's selection of *Agostini* as a vehicle, and the way in which it operates that vehicle, represent a misuse of the Court's power to effect legal change.

The Court reaches its conclusion that the law changed, post-*Zobrest* and pre-*Agostini*, by relying on readings of the two lines of *Lemon* school-aid precedent I distinguished in Part II: the line that runs from *Meek* to *Ball* and *Aguilar*, and the line extending from *Mueller* to *Witters* and *Zobrest*. These two lines of precedent, I argued, coexist through their mutual employment of *Meek*'s basic constitutional distinction: the distinction between unconstitutional "direct and substantial" aid to religious schools' educational function, on one hand, and constitutionally permissible "indirect and insubstantial" aid, on the other. *Agostini*'s interpretive technique is to read the post-*Aguilar* cases in the second line of precedent—*Witters* and *Zobrest*—as undermining the "assumptions" of the *Aguilar/Ball* line, and as substituting new constitutional principles that govern the issues of unconstitutional effects and entanglement. Accordingly, the Court maintains, relief under Rule 60(b)(5) is proper, because the Court has identified a significant change in the law, post-*Aguilar* but pre-*Agostini*.

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this rule do not "specifically contemplate" relief in the circumstances *Agostini* presents, where the Supreme Court has concluded that its earlier ruling—a ruling controlling the very same case—has been undermined by its later decisions.

384. *Agostini*, 117 S. Ct. at 2018–19.

I argue in Part IV.A that *Agostini* misreads both lines of precedent. As Justice Souter pointed out in dissent, the Court interprets *Aguilar* and *Ball* to stand for "exaggerated propositions"[385] that the Court never endorsed in *Aguilar*, *Ball*, or any other case. Thus, while demonstrating that *Witters* and *Zobrest* rejected those propositions was easy work for the Court, it also was not at all to the point. Further, in its reading of the other line of precedent, *Agostini* exaggerates the holdings of *Witters* and *Zobrest*, reading them as categorical repudiations of *Ball* and *Aguilar*, complete with a new and revised theory of the Establishment Clause's limits. A more plausible reading of *Witters* and *Zobrest*, however, would see them not as path-altering rulings, but as decisions that still operate within the *Ball* and *Aguilar* framework—even if, as I suggested above, their reliance on "generality and neutrality" and on "private decisionmaking" could be a resource for a *future* law-changing decision.[386] That, at any rate, is my argument in Part IV.A below.

I consider, in Part IV.B, the Court's second general conclusion: that relief under Rule 60(b)(5) is appropriate under the circumstances of *Agostini*. This conclusion, too, I argue, is mistaken—albeit in more interesting ways than the Court is mistaken in its reading of precedent. Among other problems, the Court's decision generates a paradox: It reverses a correct decision, on the theory that the deciding court abused its discretion in deciding the case correctly. This paradox does not disappear so readily as the Court hopes. *Agostini*'s escape strategy, I argue, depends upon the incoherent view that two contradictory bodies of law held sway at the same time. Moreover, the Court's attempt to transform Establishment Clause law, in a case in which it cannot admit to changing the law, prevents the Court from developing an independent, normatively justifiable theory of the Establishment Clause. And by locating the change in Establishment Clause law in *Witters* and *Zobrest*, the Court attributes a change in the law to decisions that contain not a word of explanation for the change—not even a recognition that the law is being changed. Thus, whichever decision one takes to have changed the law—*Witters*, *Zobrest*, or *Agostini*—the Court never provides the sort of reasons one would expect from a law-transforming, precedent-overruling decision.

In Part IV.C, I suggest a way in which the Court could have avoided the paradox of reversing a legally correct decision without lapsing into incoherence. The Court does not choose this path because it would require ceding some of its interpretive authority, and some of its management

385. *Id.* at 2025 (Souter, J., dissenting).
386. *See supra* Part II.A.2.d.

powers over legal change, to the lower courts. I argue that, contrary to the Court's view, this strategy of resolving *Agostini*'s paradox is normatively defensible—certainly more defensible than the path the Court actually chose in *Agostini*. Adopting this strategy still would have left the Court vulnerable to criticism for its use of precedent, and the Court still would not have been able to effect the changes that the *Agostini* majority would have desired. But the Court's account of the process of legal change at least would have been coherent and consistent with the procedural norms that partially define the Court's authority to manage legal change.

### A. The Court's Use of Precedent

*Agostini*'s argument for a post-*Aguilar* change in the law begins with its interpretation of the *Meek* to *Aguilar* line of precedent. The four "assumptions" *Agostini* "distill[s]"[387] from the *Ball* and *Aguilar* opinions have only a loose connection to what the Court actually said in those cases. And *Agostini*'s arguments for how *Witters* and *Zobrest* both undermined those assumptions and established new effects criteria are no more persuasive. Because the Court's theory of pre-*Agostini* legal change is its sole basis for overruling *Aguilar*, any significant missteps in the Court's use of precedent are fatal.

#### 1. Indoctrination by Public Employees

Consider the Court's rendition of *Ball*'s first assumption: that "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work." The *Ball* opinion, however, does not speak of "any public employee," but specifically of teachers—the only public employees whose services on sectarian-school premises were at issue in the case.[388] *Ball* relied on the Court's earlier decision in *Meek v. Pittenger*,[389] and, slightly buttressing the *Agostini* Court's interpretation, *Ball*

387. *Agostini*, 117 S. Ct. at 2010.

388. The Court described the issue in *Ball* as follows:

> The School District of Grand Rapids, Michigan, adopted two programs in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in "leased" classrooms in the nonpublic schools. Most of the nonpublic schools involved in the programs are sectarian religious schools. This case raises the question whether these programs impermissibly involve the government in the support of sectarian religious activities and thus violate the Establishment Clause of the First Amendment.

School Dist. v. Ball, 473 U.S. 373, 375 (1985), *overruled in part by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

389. 421 U.S. 349 (1975).

did describe *Meek* as "invalidat[ing] a statute providing for the loan of state-paid professional staff—including teachers—to nonpublic schools" for on-premises teaching and other services.[390] But *Meek* specifically distinguished between the activity of teachers and counselors, and the activities of the other professionals whose activities were challenged. The teachers and counselors were "performing important educational services" in sectarian schools, the Court said.[391] The other professionals—speech and hearing specialists—were not. Of their activities, the Court wrote that "[t]he speech and hearing services authorized by [the statute], at least to the extent such services are diagnostic, seem to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools."[392]

Similarly, in *Wolman*, the Court drew a constitutional distinction between the activities of teachers and guidance counselors, on one hand, and the activities of other state-employed professionals, on the other:

> The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the non-public school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or counselor and student.[393]

For these reasons, the Court concluded, "providing diagnostic services will not create an impermissible risk of the fostering of ideological views."[394]

In light of *Meek* and *Wolman*, then, it can be no surprise that *Zobrest* could announce—citing rather than rejecting the discussions in *Meek* and *Wolman*[395] —that "the Establishment Clause lays down no absolute bar to

390. *Ball*, 473 U.S. at 386.

391. *Meek*, 421 U.S. at 371.

392. *Id.* at 371 n.21. The Court invalidated the provision of the statute authorizing speech and hearing services, but only because it found the provision unseverable from the otherwise unconstitutional statute. *See id.*

393. Wolman v. Walter, 433 U.S. 229, 244 (1977).

394. *Id.*; *see also id.* at 242 ("This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion.").

395. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 n.10 (1993).

the placing of a public employee in a sectarian school."[396] That, in fact, was one proposition those cases had established. *Zobrest* tracks the distinction established in *Meek* and *Wolman*, explaining that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor."[397] The interpreter, unlike the teacher or guidance counselor, simply relays the material to the student who relies on her services; she does not contribute any content herself, religious or otherwise.[398] Accordingly, on the Court's view, the state is not responsible for any religious indoctrination that occurs.[399]

Thus from *Meek*, to *Wolman*, to *Ball* and *Aguilar*, and finally to *Zobrest*, the Court consistently distinguished among kinds of public employees and the correspondingly different risks that they would engage in state-sponsored indoctrination. When the challenged program involved publicly employed teachers or counselors working on religious-school premises, the Court consistently invalidated the program. When the challenged program involved other kinds of public employees, the Court upheld the program if it found the service sufficiently distinguishable from teaching or counseling. *Ball* thus did not depend upon an "assumption" about public employees generally. And *Zobrest*, rather than upsetting the distinctions established in *Meek* and applied in *Ball*, works within them.

*Agostini* tries to fend off this conclusion, with the suggestion that *Zobrest* could not have depended on the view that "signers had no 'opportunity to inject religious content into their translations.'"[400] If *Zobrest* had rested on that basis, the Court says, then the Court "would have had no reason to consult the record for evidence of inaccurate translations."[401] Both the interpreter and the teacher had the opportunity to inject religious content, the Court maintains, and so "there is no genuine basis upon which to confine *Zobrest*'s underlying rationale—that public employees will not be presumed to inculcate religion—to sign-language interpreters."[402] Further, the Court contends, "even the *Zobrest* dissenters acknowledged the shift *Zobrest* effected in our Establishment Clause law when they criticized the

396. *Id.* at 13.
397. *Id.*
398. *See id.*
399. *See* Agostini v. Felton, 117 S. Ct. 1997, 2011 (1997) ("Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that 'the provision of such assistance [was] not barred by the Establishment Clause.'" (quoting *Zobrest*, 509 U.S. at 13)).
400. *Id.* (quoting *id.* at 2023 (Souter, J., dissenting)).
401. *Id.* at 2011 (citing *Zobrest*, 509 U.S. at 13).
402. *Id.*

majority for 'straying . . . from the course set by nearly five decades of Establishment Clause jurisprudence.'"[403]

*Agostini* is right that *Zobrest* presumed, in the absence of evidence to the contrary, that interpreters would follow their profession's ethical guidelines.[404] And *Agostini* is right, also, that an interpreter, like a teacher, could inject new religious content into classroom instruction. Nonetheless, *Zobrest* followed *Meek* and *Wolman* in treating teachers as a special case. Far from repudiating the assumption that publicly employed teachers present a special danger, *Zobrest* located the interpreters' services on the permissible side of the line only by distinguishing them from teaching.[405] This strategy would make no sense if, as *Agostini* suggests, *Zobrest* had treated teachers and interpreters as equally unlikely to engage in religious indoctrination.[406]

Finally, the argument based on the *Zobrest* dissent is mistaken. The opinion for the Court in *Zobrest* operates within the *Meek* and *Ball* framework, distinguishing teachers from other professionals. And the *Zobrest* dissent reads the Court's opinion in just this way, stating that "[t]he majority's decision must turn . . . upon the distinction between a teacher

403. *Id.* (quoting *Zobrest*, 509 U.S. at 24 (Blackmun, J., dissenting)).

404. *Zobrest* did not, however, "consult the record for evidence of inaccurate translations." *Zobrest* says only that "[n]othing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole." *Zobrest*, 509 U.S. at 13.

405. *See id.* ("[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.").

406. *Zobrest*'s basis for distinguishing between teachers and interpreters, while hardly unchallengeable, is readily apparent. It was unquestionably true in *Zobrest* that the religious-school classroom teacher would be generating, and the publicly paid interpreter would be conveying, religious content to James Zobrest. The question was only whether to attribute to the government the religious indoctrination that undoubtedly would occur. The Court focused not on the government's role in conveying religious material to Zobrest in particular, but instead on whether the government had a role in conveying religious content to the class as a whole. The Court's theory was that because indoctrination already would be occurring in the classroom, the presence of the interpreter "neither add[ed] to nor subtract[ed] from" the "pervasively sectarian environment" that already would be in place, independent of the government's assistance. *Id.* The government, then, could not be held responsible for the generation of religious indoctrination in that environment.

Certainly one could argue that the appropriate focus should have been on the particular student receiving assistance, not on the classroom as a whole. By providing Zobrest an interpreter, the argument would go, the government participated in the religious indoctrination of at least one student. That was, in effect, the argument pressed by Justice Blackmun's dissent in *Zobrest*. But that is simply to say that the Court could have held that the interpreter is more like a teacher, for Establishment Clause purposes, than like (for example) a diagnostic specialist. Whether or not the Court correctly applied the distinction between teachers and other public employees, the *Zobrest* opinion is very clear that one important difference between *Zobrest* and *Ball* is the difference between "the task of a sign-language interpreter" and "that of a teacher or guidance counselor." *Id.*

and a sign-language interpreter."[407] The dissent's point was that the Court had "stray[ed] from the course" in failing to recognize that a state-paid interpreter, working in a sectarian school, necessarily would be engaged in religious indoctrination.[408] The dissent did not read the Court's opinion in *Zobrest* to hold that teachers, as well as interpreters, were unlikely to become instruments of religious indoctrination—the point *Agostini* would like to attribute to *Zobrest*.[409]

In sum, then, *Zobrest* did reject the first "assumption" *Agostini* attributes to *Ball*—that "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work."[410] But *Ball* never endorsed this proposition, and it was rejected not just in *Zobrest*, but in the cases on which *Ball* relies. *Zobrest*, no less than *Meek*, *Wolman*, or *Ball*, operated by distinguishing between teachers and counselors, on one hand, and other publicly employed professionals, on the other. Nothing in *Zobrest* questions the notion that teachers and counselors—those connected with a religious school's educational function—present a particular danger of government-sponsored indoctrination. Only by distinguishing interpreters from teachers does *Zobrest* distinguish the holdings in *Meek* and *Ball*.

2. Symbolic Union

According to *Agostini*, *Ball* assumed that "the presence of public employees on private school premises creates a symbolic union between church and state."[411] By upholding the provision of an interpreter on private school premises, the *Agostini* Court reasons, *Zobrest* "implicitly repudiated" *Ball*'s assumption.[412]

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407. *Id.* at 21 (Blackmun, J., dissenting).

408. *Id.* at 22 (opinion of the Court) ("[I]t is beyond question that a state-employed sign-language interpreter would serve as the conduit for [Zobrest's] religious education, thereby assisting [the school] in its mission of religious indoctrination.").

409. Further, the strategy of relying on the dissent for propositions not defended in the Court's opinion is, while familiar, inherently suspect. One standard strategy of dissent writing—though perhaps not the wisest—is to criticize the Court by emphasizing, and sometimes exaggerating, the degree to which it has departed from precedent. In these cases, when the Court wedges its decision into the framework of existing precedent, it is not so much that "even the dissent" recognizes the Court's departure from precedent as that *only* the dissent so recognizes. Bootstrapping on the dissent's hyperbole allows the later Court to take propositions as established that the earlier Court did not have the boldness—or the votes—to establish and defend itself. *See* Paulsen, *supra* note 32, at 821 n.102 ("One . . . should be wary of a dissent's hysterical characterization of a majority holding or of dissenting suggestions of limits to the majority's holding. Frequently, such statements are rhetorical or tactical exaggerations.").

410. Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).

411. *Id.*

412. *Id.* at 2011.

One might well wonder whether a court could "repudiate" an assumption only implicitly. But even so, the Court's argument here is vulnerable to the same objection made to its treatment of *Ball*'s first putative assumption. The Court did not say in *Ball* that any public employee's presence on private school premises effects a symbolic union. Instead, *Ball*'s argument for impermissible symbolic union is more nuanced. Here, too, the Court emphasized the special significance of teachers, as opposed to other kinds of public employees. Borrowing from Judge Friendly's opinion in *Aguilar*, the Court described the public school teachers as, "so far as appearance is concerned, a regular adjunct of the religious school."[413] The apparent fusing of two faculties meant that "the religious school appears to the public as a joint enterprise."[414] The sign outside Shared Time classrooms, declaring them to be public-school classrooms, would stand as "a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day."[415] The Court's theory of symbolic union, then, was not based on the mere presence of a generic public employee on parochial-school premises.

To be sure, the Court is right that *Zobrest* implicitly rejected the symbolic-union theory on *Zobrest*'s facts. This is because the Court, in deciding *Zobrest*, reviewed a judgment by the court of appeals that rested its conclusion of unconstitutionality squarely on the symbolic-union theory.[416] *Zobrest*'s silence on that point, together with its reversal of the appellate court's judgment, implies that the Court found no unconstitutional symbolic union in that case. And the Court is right, also, that the *Zobrest* decision implicitly rejects the "assumption" *Agostini* attributes to *Ball*—that public employees' presence in a sectarian school necessarily creates an impermissible symbolic union.[417] But without any analysis in the opinion, *Zobrest* cannot be read to reject the more modest and more nuanced version of the symbolic-union theory actually applied in *Ball*. The fusing of two faculties, secular and religious, may well constitute a more "'graphic symbol' of the 'concert or union or dependency' of church and state"[418] than the presence of a single interpreter translating for a single child.

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413. School Dist. v. Ball, 473 U.S. 373, 392 (1985) (internal quotation marks omitted) (quoting Felton v. United States Dep't of Educ., 739 F.2d 48, 67 (2d Cir. 1984)), *overruled in part by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

414. *Id.* (internal quotation marks omitted) (quoting *Felton*, 739 F.2d at 67–68).

415. *Id.*

416. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993).

417. *See id.* at 13 ("[T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school.").

418. *Ball*, 473 U.S. at 391 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)).

3. Subsidization of Sectarian Education

The third "assumption" of *Ball*, according to the Court in *Agostini*, was that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking."[419] *Agostini* maintains that both parts of this *Ball* approach—the criterion of "direct aid," and the disregard of whether aid reaches the school through private decision making—have been undermined by *Witters* and *Zobrest*.

On the issue of "direct aid," *Agostini* contends, *Zobrest* displaces the assumption that all direct aid to religious schools' educational function is unconstitutional, inquiring instead whether the aid relieves "sectarian schools of costs they otherwise would have borne in educating their students."[420] When, as in *Zobrest*, the government aid merely supplements and does not supplant the religious school's existing offerings, the aid does not amount to an impermissible subsidy to religious activity.[421]

The problem with the Court's argument, as with its other arguments for a post-*Aguilar* change in the law, is that the Court both misstates *Ball*'s "assumption" and overreads the holdings of *Witters* and *Zobrest*. *Ball* did not assert that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination." Nor did *Ball* rely on a simple distinction between direct and indirect aid. Instead, *Ball* distinguished also between substantial and insubstantial aid. According to *Ball*, following *Meek*, the test of an aid program's constitutionality is whether the program provides direct *and substantial* aid to the educational function of sectarian schools.[422] *Ball* explained that this pivotal distinction between unconstitutional direct and substantial aid, on one hand, and permissible indirect and incidental aid, on the other, is a matter of "degree."[423]

*Witters* and *Zobrest* accept this distinction and operate within its confines. In *Witters*, the Court emphasized that the program it upheld would not provide substantial amounts of aid to religious institutions:

> [I]mportantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the

419. Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).
420. *Id.* at 2012–13 (quoting *Zobrest*, 509 U.S. at 12).
421. *See id.* at 2013.
422. *See Ball*, 473 U.S. at 393 (declaring that the test is whether government aid results in the "'direct *and substantial* advancement of the sectarian enterprise'" (quoting Wolman v. Walter, 433 U.S. 229, 250 (1977)) (emphasis added)); Meek v. Pittenger, 421 U.S. 349, 366 (1975) ("Substantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a whole.").
423. *Ball*, 473 U.S. at 394 (citing *Zorach*, 343 U.S. at 314).

> Washington program as a whole will end up flowing to religious education. . . . The program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy. No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program.[424]

*Zobrest* was, if anything, more explicit in its acceptance of the *Ball* and *Meek* framework. *Zobrest* acknowledged the Court's holdings in *Meek* and *Ball* that "[s]ubstantial aid to the educational function of [religious] schools" results in "the direct and substantial advancement of religious activity."[425] And the distinction between substantial and incidental aid structures much of *Zobrest*'s discussion. The program invalidated in *Meek*, the Court noted in *Zobrest*, involved "'massive aid' to private schools," most of them sectarian.[426] Further, the Shared Time and Community Education programs, invalidated in *Ball*, "'in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.'"[427] But under the program challenged in *Zobrest*, by contrast, religious schools are "only *incidental* beneficiaries," "to the extent [they] benefit at all."[428] In fact, the Court said,

> [t]he only *indirect* economic benefit a sectarian school might receive [under the program] is the disabled child's tuition—and that is, of course, assuming that the school makes a profit on each student; that, without an . . . interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.[429]

*Zobrest*, then, far from undermining the *Ball* framework, upholds the placement of an interpreter in a religious school precisely by employing that framework, locating the challenged aid on the indirect and incidental side of the line.

*Agostini* is right that *Zobrest*, on the issue of subsidization, notes that the challenged government aid did not "relievf[e] the sectarian school of costs [it] otherwise would have borne in educating [its] students."[430] The *Agostini* Court goes on, however, to draw two inferences from *Zobrest*'s use of this formulation. First, *Agostini* suggests, the *Zobrest* formulation

424. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986).
425. *Zobrest*, 509 U.S. at 12 (quoting *Meek*, 421 U.S. at 366).
426. *Id.* at 11 (quoting *Meek*, 421 U.S. at 364–65).
427. *Id.* at 12 (quoting *Ball*, 473 U.S. at 397).
428. *Id.* (emphasis added).
429. *Id.* at 10–11 (emphasis added).
430. Agostini v. Felton, 117 S. Ct. 1997, 2012 (1997) (quoting *Zobrest*, 509 U.S. at 12).

displaces *Ball*'s direct and substantial aid test.[431] And if so, *Agostini* continues, then the question is whether New York City's Title I program "relieve[s] sectarian schools of costs they otherwise would have borne in educating their students."[432] Because Title I instruction by law may only supplement, not supplant, the instruction that otherwise would be offered in a sectarian school,[433] *Agostini* concludes, then as a matter of law the city's Title I program does not impermissibly finance government indoctrination.[434]

Both steps in this argument are mistaken. *Zobrest* does not displace the "direct and substantial aid" test of *Meek* and *Ball*. In the passages of *Zobrest* discussed above, the Court also classifies the aid to the school in which the interpreter was to work as indirect and incidental, and therefore permissible. Further, even if we were to accept *Agostini*'s argument that the "relieve of costs otherwise borne" formulation is the reigning subsidization test, still, the Court's ultimate conclusion—that Title I does not impermissibly subsidize sectarian education—would not follow from *Zobrest*. This is because in *Zobrest*, the Court says explicitly that the aid in *Ball did* relieve sectarian schools of costs they otherwise would have borne[435]—in spite of the fact that the courses provided in the Shared Time and Community Education programs had not been offered in the sectarian schools before.[436] *Ball*, in other words, rejected the significance of *Agostini*'s distinction between aid that "supplements" and aid that "supplants" a sectarian school's curriculum.[437] Nevertheless, *Zobrest* still described the aid in *Ball* as "relieving the sectarian school of costs it otherwise would have borne." Thus, the Court's conclusion—that aid that merely supplements rather than supplants a

431. *Compare id.* at 2011 ("[W]e have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid."), *with id.* at 2012 ("[T]he aid in *Zobrest* did not indirectly finance religious education by 'reliev[ing] the sectarian schoo[l] of costs [it] otherwise would have borne in educating [its] students.'" (quoting *Zobrest*, 509 U.S. at 12)) *and id.* at 2013 (Title I services do not "'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.'" (quoting *Zobrest*, 509 U.S. at 12)).

432. *Id.* at 2013 (quoting *Zobrest*, 509 U.S. at 12).

433. *See id.* (citing 34 C.F.R. § 200.12(a) (1996)).

434. *See id.* at 2012–13.

435. *See Zobrest*, 509 U.S. at 12 ("[T]he programs in *Meek* and *Ball*—through direct grants of government aid—relieved sectarian schools of costs they otherwise would have borne in educating their students.").

436. *See Ball*, 473 U.S. at 396–97.

437. *See supra* notes 126–132 and accompanying text.

sectarian school's curriculum is necessarily constitutional—is inconsistent with, not a consequence of, what the Court said in *Zobrest*.[438]

The second part of *Agostini*'s argument against *Ball*'s subsidization "assumption" is that *Ball* ignored the role of "private decisionmaking" as a factor mediating between the state and the individual recipient of government aid. *Witters* and *Zobrest*, the Court says, relied explicitly on this factor—together with the related factor of the challenged programs' neutral eligibility criteria—to uphold the challenged programs. And the Title I program, according to *Agostini*, is relevantly similar. Here, too, the Court maintains in *Agostini*, Title I funds go to local educational agencies, and they distribute services "directly to the eligible students within [their] boundaries, no matter where [the students] choose to attend school."[439] Here, too, the eligibility criteria are neutral, making aid "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[440] And here, too, the Court emphasizes in *Agostini*, aid reaches the private schools only to the extent that parents make the "genuinely independent and private" choice to place eligible children in religious schools.

The problem with this argument is the same problem discussed above: *Agostini* discusses only half of the subsidization test applied in *Witters* and *Zobrest*. At most, the argument shows that Title I aid reaches religious schools only indirectly, through the effects of private choices. But both *Witters* and *Zobrest* noted, further, that the aid at issue in those cases was not "substantial."[441] The Court in *Agostini* may insist that the number of religious-school students served is constitutionally insignificant,[442] but as

438. In his *Agostini* dissent, Justice Souter goes on to argue that the distinction between supplementary and supplanting services is "impossible to draw." What was "remarkable" about New York City's Title I program pre-*Aguilar*, he says, was that it assumed, at public expense,

> a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them.

*Agostini*, 117 S. Ct. at 2021 (Souter, J., dissenting). In this argument, Justice Souter follows *Ball* and *Meek*. *See id.* at 2022. For the Court's discussion on this point in *Ball*, see *supra* notes 126–131. Justice Souter argues, further, that because Title I instruction covers "core subjects," the Court's "relieve of costs otherwise borne" criteria is satisfied. *Agostini*, 117 S. Ct. at 2024 (Souter, J., dissenting).

439. *Agostini*, 117 S. Ct. at 2013 (citing 20 U.S.C. §§ 6311–6312 (1994)).

440. *Id.* at 2011 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

441. *See supra* notes 424–438 and accompanying text.

442. *See Agostini*, 117 S. Ct. at 2013 ("Although Title I instruction is provided to several students at once, wbereas an interpreter provides translation to a single student, this distinction is not constitutionally significant."); *id.* ("*Zobrest* did not turn on the fact that James Zobrest had, at

discussed, both *Witters* and *Zobrest* upheld the challenged aid only after classifying it as incidental or minimal.[443]

Let me be clear about my argument here. I have acknowledged that *Witters* and *Zobrest* would be helpful resources to a Court that seeks to change the law. The *Mueller* to *Zobrest* line of cases, I have said, depends upon notions not mentioned in the *Meek* to *Aguilar* line. These notions—the generality and neutrality of eligibility criteria, and private decision making as a mediating factor between state and religious school—are potentially expansive. If these notions were made sufficient conditions of a program's constitutionality, then the Court could validate a wide range of programs aiding religious education, including comprehensive voucher schemes.[444]

My point is simply that *Witters* and *Zobrest* did not themselves undertake this change in the law. These cases may be in tension with the *Meek* to *Aguilar* line, but the two bodies of precedent coexisted before *Agostini*.[445] The mechanism of their coexistence was the distinction, invoked in each line of cases, between unconstitutional direct and substantial aid and constitutionally permissible indirect and incidental aid. It may well be that a program's constitutionality should not turn on this distinction. But to undo that distinction is to change the law that prevailed through *Zobrest*, and that is precisely what the Rule 60(b)(5) context bars the Court from doing.

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the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.").

443. *Agostini* relies on the neutrality of an aid program's eligibility criteria for one further point, apart from the subsidization issue: neutral eligibility criteria, *Agostini* says, give potential recipients no incentive to undertake religious indoctrination, and to that extent, the program is less likely to advance religion. *See id.* at 2014. In the course of criticizing *Ball* and *Aguilar* for giving this consideration "no weight," *Agostini* elevates the "neutral criteria" factor to one part of its three-part effects test. Giving greater "weight" to this consideration, however, would not by itself change the *Ball* and *Aguilar* outcomes. As the Court admits, the neutrality of a program's eligibility criteria is a necessary but not sufficient condition fot constitutionality. *See id.* (citing, with an "*accord*" signal, this point in Justice Souter's dissent). The question still would remain whether the challenged program impermissibly indoctrinated, or impermissibly subsidized religion. And the arguments above have suggested that the post-*Aguilar* decisions did not effect a pre-*Agostini* legal change in these respects. *See id.* at 2025 (Souter, J., dissenting).

444. *See supra* note 202 and accompanying text.

445. Their coexistence becomes more clear when one considers also *Mueller*, not just *Witters* and *Zobrest*. *Mueller* was decided in 1983. *Ball* and *Aguilar* were decided in 1985. *Witters* was decided in 1986. The two lines of precedent were thus intertwined from the start. Focusing only on the post-*Aguilar* cases in the *Mueller* line—*Witters* and *Zobrest*—makes apparently more plausible the Court's argument that the *Mueller* principles repudiate the *Meek* to *Aguilar* line.

4. The On-Premises/Off-Premises Distinction

In its arguments against both the symbolic union and subsidization theories, *Agostini* relies on a claim about *Aguilar*'s limits. *Aguilar*, the Court says in *Agostini*, "implied that providing [Title I] services off-campus is entirely consistent with the Establishment Clause."[446] The Court here renews an argument Justice O'Connor made in her *Aguilar* dissent. While *Aguilar* itself considered only on-premises services, the argument goes, *Wolman*, decided eight years earlier, upheld programs in which public employees provided off-premises remedial instruction and guidance counseling to parochial school children.[447] O'Connor's opinion for the Court in *Agostini*, like her *Aguilar* dissent, relies heavily on the apparent arbitrariness of the distinction between on-premises and off-premises services. With respect to symbolic union, the Court declares that there is no "perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside."[448] And with respect to the subsidization theory, the Court maintains, the circumstance "most fatal" to this argument is "that it applies with equal force when . . . services are provided off-campus."[449]

Justice Souter's *Agostini* dissent responds to this argument by noting, first, that the issue of off-premises services was not presented in *Aguilar* (or *Agostini*), and thus the question whether *Aguilar*'s rationale should extend that far remains open.[450] Further, Souter argues, "if a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects," the on-premises/off-premises line is "sensible."[451] When state officials administer classes inside the religious school, Souter maintains, the degree of symbolic union between church and state is greater than when the state "keep[s] its distance."[452] And finally, Souter contends with respect to the subsidization point, a religious school is "arguably less likely" to rely on programs like Title I to supplant its existing courses when the courses

446. *Agostini*, 117 S. Ct. at 2013; *see also id.* at 2012, 2015.
447. *See id.* at 2008 (citing Wolman v. Walter, 433 U.S. 229, 248 (1977)); *see also* Aguilar v. Felton, 473 U.S. 402, 426 (1985) (O'Connor, J., dissenting), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).
448. *Agostini*, 117 S. Ct. at 2012.
449. *Id.* at 2013.
450. *See id.* at 2022 (Souter, J., dissenting).
451. *Id.*
452. *Id.*

must be offered off-premises—although Souter's reasoning here is not entirely clear.[453]

Justice Souter is right that teaching Title I courses off-premises will diminish the degree of perceptible union, and he may be right that religious schools are more likely to turn over instruction in basic subjects when they can do so conveniently, through on-premises instruction. Whether these differences in degree should make a constitutional difference, however, is not exactly obvious. Particularly with respect to subsidization, the distinction between on-premises and off-premises instruction is difficult to defend: Either way, the government, by covering instruction in basic secular subjects, would "make it easier for [religious schools] to . . . concentrate their resources on their religious objectives."[454]

The more pertinent reply to *Agostini*'s suggestion that the distinction is arbitrary is Souter's first observation—off-premises instruction was not at issue in *Aguilar*, and thus it was not at issue in *Agostini* either. Given the Rule 60(b)(5) context, the question the Court must answer in *Agostini* is whether the Court's cases post-*Aguilar* have undermined the distinction between on-premises and off-premises instruction, not whether the distinction, from the Court's present perspective in *Agostini*, makes sense. The Court, however, does not even attempt to argue that either *Witters* or *Zobrest* undermines the distinction between on-premises and off-premises instruction.

Further, even if the distinction is arbitrary, the Court in *Aguilar* was not clearly committed to that distinction. *Agostini* acknowledges this point at least implicitly.[455] And thus even if *Aguilar*, to avoid arbitrariness, must be either expanded or contracted, that insight does not tell us the direction

453. *See id.* Justice Souter writes:

> The off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patently significant cut-backs in basic teaching within the schools to offset the outside instruction; if the aid is delivered outside of the schools, it is less likely to supplant some of what would otherwise go on inside them and to subsidize what remains.

*Id.* I read this passage to suggest that the inconvenience and inefficiency of teaching basic courses off-premises would discourage the school from turning those courses over to public employees.

454. *Id.*

455. *See id.* at 2012 (opinion of the Court) ("Justice Souter does not disavow the notion, uniformly adopted by lower courts, that Title I services may be provided to sectarian school students in off-campus locations"); *id.* at 2013 ("*Aguilar* implied that providing the services off-campus is entirely consistent with the Establishment Clause"); *id.* at 2015 (stating that "no court has held that Title I services cannot be offered off-campus," citing *Aguilar* as "limiting [its] holding to on-premises services," and citing also three decisions from lower federal courts).

in which the Court should proceed. Nor do *Witters* or *Zobrest* speak to the question.

The Court's best argument that *Aguilar* was committed to a constitutional distinction between on-premises and off-premises instruction is its suggestion that *Wolman* decided that very point eight years before *Aguilar*. *Wolman*, as the Court describes the case, upheld "programs employing public employees to provide remedial instruction and guidance counseling to nonpublic school children at sites away from the nonpublic school."[456] But whereas Justice O'Connor's dissent featured this argument, contending that unless *Wolman* were overruled the Court was committed to the distinction between on-premises and off-premises services,[457] *Agostini* invokes this aspect of *Wolman* only in passing, in a "*cf.*" citation.[458] *Agostini*'s caution in relying on *Wolman* seems to me justified. *Wolman* did permit publicly funded "remedial services" and guidance counseling for parochial-school students, when offered off-premises, but the Court's opinion does not make clear the precise nature of those services. The Court stated its belief that "the programs are not intended to influence the classroom activities in the nonpublic schools."[459] While "involvement with the day-to-day curriculum of the parochial school would be impermissible," and while "grave constitutional questions" would arise if "remedial service teachers" were to "plan courses of study for use in the classroom," the Court did not understand the programs it reviewed to be connected with the ongoing operations of the religious school.[460] These programs did not, therefore, threaten to subsidize sectarian schools by "taking over a substantial portion of [the schools'] responsibility for teaching secular subjects,"[461] as in *Ball* and *Aguilar*.[462]

456. *Id.* at 2008.

457. *See* Aguilar v. Felton, 473 U.S. 402, 426 (1985) (O'Connor, J., dissenting), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

458. *See Agostini*, 117 S. Ct. at 2008.

459. Wolman v. Walter, 433 U.S. 229, 246 n.13 (1977).

460. *Id. But see* Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 93 n.37 (1996) (stating that, under *Wolman*, the public school district in the *Kiryas Joel* case could have offered "special education classes for students attending religious schools," so long as the classes were held at a neutral site).

461. School Dist. v. Ball, 473 U.S. 373, 397 (1985), *overruled in part by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

462. Because *Aguilar* focused on entanglement rather than effects, it did not draw this subsidization conclusion explicitly. Nonetheless, *Aguilar* noted the similarity between New York City's Title I program and the programs invalidated in *Ball*. *See Aguilar*, 473 U.S. at 409. And in rejecting the argument that New York City's monitoring system distinguished *Aguilar* from *Ball*, the Court stated that "at best" the system of monitoring would prevent direct religious indoctrination—not, presumably, subsidization. *See id.*

Thus, whether or not the distinction between on-premises and off-premises instruction should be considered constitutionally significant, the Court was not clearly committed to it pre-*Aguilar*. Neither *Ball* nor *Aguilar* addressed the issue of off-premises instruction, nor did any post-*Aguilar* case establish that the distinction between on-premises and off-premises instruction is arbitrary. *Agostini*'s conclusion that the distinction is arbitrary, then, is its own contribution, not a reflection of law already in place pre-*Agostini*. In the Rule 60(b)(5) context, therefore, the Court cannot rely on this "arbitrariness" argument to unsettle the decisions in *Ball* and *Aguilar*.

5. Entanglement

The Court's entanglement conclusion depends heavily on its reading of the indoctrination issue. If, as the Court maintains, Title I teachers present no significant risk of engaging in religious indoctrination, then no intrusive system of monitoring would be constitutionally required. The Court's argument against *Aguilar*'s entanglement theory, then, is no stronger than its argument against *Ball*'s "state-sponsored indoctrination" theory. And for reasons expressed above, the Court fails to displace the latter theory.[463]

This is not to deny the accuracy of *Agostini*'s charge that *Aguilar*'s indoctrination and entanglement theories might merit revision. *Aguilar* doubtless does exaggerate the risk that publicly employed teachers, when teaching secular subjects in various schools whose religious affiliations the teachers generally do not share, will depart from their instructions and launch into religious indoctrination.[464] And as for the entanglement theory, even Justice Souter's dissent concedes his "reservation" about *Aguilar*'s "emphasis on the excessive entanglement produced by monitoring religious instructional content."[465] But in the context of a Rule 60(b)(5) motion for relief from *Aguilar*'s judgment, the Court was required to find a change in the law in post-*Aguilar* cases, not to effect legal change through the *Agostini* decision itself. And in that task, the Court failed.

6. Significance of the Court's Misuse of Precedent

Suppose I am right that the Court mischaracterized its own precedent in order to reach a particular result in *Agostini*. The objection might be: so

463. *See supra* Part III.A.1.

464. *See Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting); *see also, e.g.*, Lupu, *supra* note 203, at 244; Laycock, *Neutrality*, *supra* note 32, at 1007.

465. Agostini v. Felton, 117 S. Ct. 1997, 2020 (1997).

what? What can be considered so unusual about an opinion in which the Court pretends, without adequate justification, that its present decision is compelled by past precedent? That the Court issues such opinions is not exactly fresh news.[466] While it might be worth noting that the Court was not, contrary to its claims, compelled by precedent to reach its present result, this criticism would seem to amount only to the familiar call for greater candor.[467] The Court, on this well-worn story, should own up to the fact that its present decision makes new law and is not compelled by past decisions, and it should explain the theory that adequately justifies its present decision.

Part of the argument against *Agostini* is indeed the argument for greater candor. The Court does not take responsibility for its decision to change the law in *Agostini*, and it is incorrect to attribute that change to past decisions. The Court, also, has failed to provide a theory, independent of precedent, that justifies the *Agostini* result. But *Agostini* is not just a garden-variety case of the Court's disingenuous manipulation of precedent. In standard cases, the Court's result could be justified by an independent theory that it could have provided but instead left only implicit. That is not so in *Agostini*. In selecting *Agostini* as the case in which to overrule *Ball* and *Aguilar*, and to revise Establishment Clause law, the Court forfeited the right to rely on a theory of the Establishment Clause that is independent of the Court's post-*Aguilar* decisions. *Agostini*'s Rule 60(b)(5) context requires the Court to locate a change in Establishment Clause law in its own post-

466. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

467. On the academic demand for judicial candor, see, for example, David L. Shapiro, *In Defense of Candor*, 100 HARV. L. REV. 731 (1987).

> Since they first began publication, American law reviews have seen the criticism of judicial opinions as a major part of their mission. A typical law review note, or even a leading article, will address an important judicial decision, or series of decisions, in an effort to show that the court has misconceived the problem, the solution, or both. Implicit in the analysis is a hint that whoever wrote the opinion was too inept, or perhaps too devious, to reveal what was really at stake.

*Id.* at 731. This is not to say that legal scholars always have understood the same thing by judicial candor, nor is it to deny that some scholars have questioned whether judges always must be candid. *See, e.g.*, Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1316–21 (1995) (discussing different conceptions of judicial candor defended in the academic literature); *id.* at 1310 ("[J]udges—especially life-tenured appellate judges, such as those sitting on the U.S. Supreme Court and Courts of Appeals—may regularly forgo candor under the principles of logic and prudence and still retain their political legitimacy and institutional integrity."); *cf.* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (distinguishing between candor and "introspection" or self-consciousness and arguing that more self-conscious judicial decision making would not necessarily be better judicial decision making).

As explained in text below, however, my argument is not simply that the Court's opinion did not disclose its true grounds of decision, but also that its choice of *Agostini* as a law-transforming vehicle made adequate justification of its decision impossible, even post hoc.

*Aguilar* precedents, not in a theory that was never adopted in those precedents. The Court's misreading of precedent, therefore, cannot be made good by specifying post hoc a constitutional theory, implicitly presupposed but not articulated in the Court's opinion, that would justify the *Agostini* result.

The Court's mistake in *Agostini*, then, is more than just lack of candor or a disingenuous manipulation of precedent. It amounts, instead, to a more general error—the Court's failure to manage properly the process of legal change. Even assuming that some theory of the Establishment Clause properly would justify the transformation initiated in *Agostini*, the Court was required not just to provide such a theory, but to select a case in which such a theory permissibly could be offered. The Court's failure to do so makes more irresistible the inference that the Court has not merely written an unconvincing opinion, but embarked upon a more fundamentally illegitimate enterprise.

Doubtless one reason the Court settled on *Agostini* as its overruling vehicle was its difficulty in finding other suitable cases that presented the *Aguilar* issue. The Court does not refer directly to this difficulty in its *Agostini* opinion,[468] but the arguments presented to the Court made the problem clear. According to the merits brief filed on behalf of the group of parents who challenged *Aguilar*:

> [T]here is [no] way for these parties, or any others, to seek *Aguilar*'s overruling in any other case that has arisen in its aftermath. There have been a series of lawsuits filed across the country in which plaintiffs have attempted to extend *Aguilar* by arguing that the Establishment Clause prohibits the alternative arrangements that have been implemented in its wake. These challenges have been rejected by [various lower courts]. Yet in none of these cases have pro-*Aguilar* plaintiffs petitioned for certiorari in this Court. The clear signals of *Aguilar*'s impending demise have produced a situation in which cases

468. Justice Ginsburg's dissent suggests that other "vehicles" for reconsidering *Aguilar* were already "in motion." *Agostini*, 117 S. Ct. at 2028 (Ginsburg, J., dissenting). The Court responds, not by denying that other cases that might present the *Aguilar* issue were available, but by stating: "[W]e see no reason to wait for a 'better vehicle' in which to evaluate the impact of subsequent cases on *Aguilar*'s continued vitality." *Id.* at 2018 (opinion of the Court). According to the Court, the *Agostini* decision neither "undermines 'integrity in the interpretation of procedural rules' [n]or signals any departure from the 'responsive, non-agenda-setting character of this Court.'" *Id.* (quoting *id.* at 2028 (Ginsburg, J., dissenting)). Further, the Court says, delay in reaching the issue would compound the injustices *Aguilar* visited on the New York City schools and their students. *Id.* at 2018–19.

> that might present an opportunity to overrule *Aguilar* are being strategically withheld from the Court's consideration.[469]

But even if we assume that plaintiffs' attorneys had a stranglehold on Title I cases pending at the time the Court considered *Agostini*, it does not follow that no other case would present the *Aguilar* issue. The government conceded that "a school district other than New York" could request funding for Title I services that would be offered on the premises of religious schools, and then contest the decision by the secretary of education to deny funding.[470] While, as the government points out, "all lower courts in the Nation would be obligated to follow *Aguilar*"[471] in this action, still, when the case reached the Supreme Court it would not involve *Agostini*'s Rule 60(b)(5) complications. The Court, then, would have been free to present all the arguments against *Aguilar*, not just the ones it can torture out of the *Witters* and *Zobrest* opinions.

Similarly, the question whether *Aguilar* should be overruled might arise from a challenge to a state school-aid program. The government's *Agostini* brief comes close to conceding this point,[472] but then argues that factual differences between Title I and a state scheme might preclude the Court from reaching the *Aguilar* issue.[473] Both *Aguilar* and *Agostini* demonstrate that this argument is unpersuasive. In *Aguilar*, the Court treated Grand Rapids's Community Education and Shared Time programs as essentially similar to New York City's Title I program, differing only in the two programs' respective degrees of monitoring.[474] The Court therefore held, without further analysis, that Title I failed *Ball*'s effects test, with the possi-

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469. Brief for Petitioners Rachel Agostini et al. at 44–45, *Agostini* (Nos. 96-552, 96-553) (footnote omitted). The Government's brief makes a similar argument:

> It is doubtful whether, absent the avenue for relief under Rule 60(b) that petitioners have invoked, this Court would ever be presented with a suitable vehicle for reconsideration of *Aguilar*. . . . [P]rivate plaintiffs have challenged the provision of Title I services to religious school students even after *Aguilar* as inconsistent with the Establishment Clause, but those contentions have been uniformly rejected in the lower courts. The losing plaintiffs have not sought this Court's review, and, because the school districts and the Secretary prevailed in those cases, there has been no opportunity to request this Court to reconsider *Aguilar*.

Brief for the Secretary of Education at 44, *Agostini* (Nos. 96-552, 96-553).

470. Brief for the Secretary of Education at 45, *Agostini* (Nos. 96-552, 96-553). The government adds, however, that because the secretary's position is that *Aguilar* should be overruled, there might be difficulties in finding counsel to defend the pro-*Aguilar* position. *See id.* The government does not explain why a group of intervenors or an amicus group would not take up *Aguilar*'s defense.

471. *Id.*

472. *See id.* at 44 n.17.

473. *See id.*

474. *See supra* notes 145–146 and accompanying text.

ble exception that the Title I monitoring procedures might relevantly decrease the risk that state officials would engage in religious indoctrination.[475] And in *Agostini*, while the Court was faced directly with New York City's Title I program only, it did not hesitate to overrule the portions of *Ball* dealing with Grand Rapids's Shared Time program.[476] Establishment Clause cases may be more fact-specific than cases in many other areas of law, but the Court never has treated each statute as wholly incommensurable with every other.[477]

It seems at least likely, then, that the Court could have reached the *Aguilar* issue in a case that would have allowed the Court to consider all the reasons for *Aguilar*'s overruling, not just those allegedly implicit in *Witters* and *Zobrest*. Doubtless the Court was frustrated that the strategic behavior of litigants prevented it from reconsidering *Aguilar* as quickly as it would have liked. That, however, is a limit on the Court's power to manage legal change that it ordinarily must tolerate.

### B. *Agostini*'s Paradox

Even if *Agostini* were correct in its reading of post-*Aguilar* precedent, the Court would face one further difficulty: the problem of whether relief under Rule 60(b)(5) is appropriate. One indication of this difficulty is the solicitor general's concession at oral argument that he did "not know of another instance in which Rule 60(b) has been used" to grant relief from a judgment under circumstances similar to the *Agostini* case.[478] While lack of precedent is not necessarily fatal to the theory, it does indicate the extraordinary nature of the *Agostini* proceedings.

I have already identified one central problem in *Agostini*'s Rule 60(b)(5) theory. The Court had said in *Rodriguez de Quijas* that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."[479] The district court complied

475. *See supra* notes 148–149 and accompanying text.

476. *See* Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) ("We . . . overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.").

477. One final way in which the Court could have reconsidered *Aguilar* free from Rule 60(b)(5) problems: The New York City Board of Education could have obtained review by violating the *Aguilar* prohibition and contesting the *Aguilar* issue in a contempt proceeding.

478. Oral argument in *Agostini* at 11, *cited in Agostini*, 117 S. Ct. at 2026 (Ginsburg, J., dissenting).

479. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

with this rule in *Agostini*, denying relief. And in reviewing this decision,[480] the Supreme Court confirmed that the district court had ruled correctly.[481] Yet it reversed the trial court's decision as an abuse of discretion. And how can a legally correct decision be an abuse of discretion? This difficulty is one side of *Agostini*'s paradox.[482]

The other side of the paradox appears when one considers what the Court would have done if the district court had decided *Agostini* the other way—accepting the theory the Court later announced in *Agostini*, and deciding that *Aguilar* is no longer good law. Under *Rodriguez de Quijas*, the Court would have denounced the district court's illegal usurpation of Supreme Court prerogative. Nonetheless, because the district court and Supreme Court would have shared the same Establishment Clause theory, the Court doubtless would have affirmed the district court's judgment. But how could a legally incorrect decision be affirmed as a proper exercise of discretion? This difficulty is the other side of *Agostini*'s paradox.

*Agostini* tries to escape the paradox by denying it, suggesting that the Court has done nothing other than apply standard principles in granting Rule 60(b)(5) relief. Under the abuse-of-discretion standard, the Court observes, "an exercise of discretion cannot be permitted to stand if . . . it rests upon a legal principle that can no longer be sustained."[483] That, the Court implies, is the case in *Agostini*. Further, *Agostini* maintains, the Court's ordinary practice is to "apply the rule of law we announce in a case to the parties before us," even if, as in *Agostini*, the Court is overruling a case on which the district court properly relied.[484] In this connection the Court invokes *Adarand Constructors v. Pena*,[485] in which the lower courts properly relied on a precedent that the Court proceeded to overrule. In *Adarand*, *Agostini* notes, the Supreme Court reversed the lower courts' decisions, even

480. Technically, of course, the Court was reviewing the Second Circuit's unpublished order affirming "substantially for the reasons stated" by the district court. *See* Felton v. United States Dep't of Educ., Nos. 96-6160, 96-6180, 96-6181, 1996 U.S. App. LEXIS 22981, at *2 (2d Cir. August 30, 1996).

481. *See Agostini*, 117 S. Ct. at 2017 (stating that the trial court was "correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent").

482. Justice Ginsburg's dissent comes to a similar conclusion. Because "the district court made no legal error in determining that *Aguilar* had not been overruled," she writes, and because the Court's "appellate role here is limited to reviewing that determination," the Court can grant no relief under Rule 60(b)(5). *Id.* at 2028 (Ginsburg, J., dissenting). Justice Ginsburg focuses, however, not so much on the paradox the Court's decision engenders as on the improper purpose to which the Court "bends" Rule 60(b)(5). In her view, the Court converts a rule that governs district court proceedings into a mechanism allowing "an 'anytime' rehearing" in the Supreme Court, at least "in this case." *Id.*

483. *Id.* at 2018 (opinion of the Court).

484. *Id.* at 2017 (citing *Rodriguez de Quijas*, 490 U.S. at 485).

485. 515 U.S. 200 (1995).

though those courts were correct to rely on the precedent that the Supreme Court subsequently overruled.[486]

The Court's general observation that legal error is an abuse of discretion does not address *Agostini*'s paradox. The standard situation in which the Court applies this general rule is one in which the lower court has committed an ordinary legal error.[487] In this case of ordinary legal error, reversal creates no paradox: The lower court decided the case incorrectly, and accordingly its decision must be reversed. This standard case, however, is different from the *Agostini* situation, in which the lower court has ruled *correctly*, not incorrectly, and the Court nevertheless reverses. If *Agostini* is to be defended, then, it must be with a principle more particular than the general rule that legal error is an abuse of discretion.

More to the point is the Court's further and more particular argument—that when the Court overrules its own precedent, it will reverse a lower court's decision that properly relied on the overruled precedent. In *Adarand*, to take the Court's example, the decision below was legally correct when rendered, and yet the Court nonetheless reversed. *Agostini*, the Court suggests, follows the same pattern. Cases like *Adarand*, then, seem to support the Court's claim that its action in *Agostini* was not extraordinary.

The other side of the paradox, I said, is a case in which the Court, in overruling, affirms a legally incorrect decision. Here the Court could mention *Rodriguez de Quijas*, the case from which the Court takes its rule that lower courts must follow directly controlling Supreme Court precedents, even if those precedents seem to be undermined by later Supreme Court pronouncements. In *Rodriguez de Quijas*, the Court reviewed a Fifth Circuit decision that had declared a Supreme Court precedent, *Wilko v. Swan*,[488] "obsolescen[t]" in light of more recent Court authority.[489] *Wilko*, not yet overruled by the Supreme Court, spoke directly to the specific issue that the Fifth Circuit considered, while the more recent precedent on which the Fifth Circuit based its "obsolescence" conclusion concerned only analogous situations.[490] The Supreme Court agreed with the Fifth Circuit that *Wilko*

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486. *See Agostini*, 117 S. Ct. at 2017.

487. This situation is the one envisioned in the case the Court cites for support. *See id.* at 2018 ("'A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990))).

488. 346 U.S. 427 (1953).

489. Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1299 (5th Cir. 1988).

490. *Wilko* concerned the arbitrability of claims arising under section 12(2) of the Securities Act of 1933, whereas the more recent Supreme Court precedent addressed the arbitrability of claims arising under section 10(b) of the Securities Exchange Act of 1934. The relevant issue in *Rodriguez de Quijas* was the arbitrability of the former kind of claim. *See id.* at 1296–97. The Fifth Circuit noted the similarities between the two kinds of claims. *See id.* at 1299.

should be overruled, and the Court in fact did overrule that case.[491] On that basis, the Court affirmed the Fifth Circuit's judgment. But at the same time, the Court stated that the Fifth Circuit had no authority to do anything other than follow *Wilko*, the directly controlling and not-yet-overruled Supreme Court precedent.[492] Thus in *Rodriguez de Quijas*, the Supreme Court, in overruling, affirmed a decision it deemed legally incorrect.[493]

This strategy of escape from *Agostini*'s paradox does have the benefit of making *Agostini* appear to be routine rather than unprecedented. Yet, as an initial matter, it does not so much dispel the paradox as deepen it, locating the paradox in the ordinary case, and the very logic, of overruling. This strategy, then, is not an appealing way of justifying *Agostini*'s decision to overrule.

Moreover, *Adarand* and *Rodriguez de Quijas* are not in fact on the same footing with *Agostini* with respect to the paradox I have identified. As I will suggest, the paradox is dispelled easily enough in considering *Adarand* and *Rodriguez de Quijas*. The paradox, however, is more intractable in *Agostini*—because of *Agostini*'s Rule 60(b)(5) context, not present in *Adarand* or *Rodriguez de Quijas*.

Consider, first, the *Adarand* side of the paradox, in which the lower courts correctly rely on a precedent the Supreme Court proceeds to overrule. In *Adarand*, the lower courts properly refused to apply strict scrutiny to a federal agency's affirmative action plan, following the Court's earlier decision in *Metro Broadcasting, Inc. v. FCC*.[494] The Supreme Court's decision to overrule *Metro Broadcasting*, however, changed the relevant law. Thus, while the lower courts' decisions were correct at the time they were rendered, they were incorrect by the time the Court had changed the law

491. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989).

492. *See id.* at 484; *see also id.* at 486 (Stevens, J., dissenting) ("The Court of Appeals refused to follow *Wilko v. Swan*, . . . a controlling precedent of this Court. As the majority correctly acknowledges, . . . the Court of Appeals therefore engaged in an indefensible brand of judicial activism." (citations omitted)).

493. Jack Beermann has pointed out to me that the *Rodriguez de Quijas* principle is dictum, in the sense that it is unnecessary to the Court's judgment. On either side of the paradox, the Court will affirm or reverse the lower court's judgment based on the Court's view of the substantive legal issue, not the lower court's obedience to the *Rodriguez de Quijas* principle. In fact, the point of the paradox is that the Court will affirm when the lower court disobeys the *Rodriguez de Quijas* stricture, and reverse when the lower court obeys. Still, as Justice Scalia has noted:

> Let us not quibble about the theoretical scope of a "holding"; the modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

494. 497 U.S. 547 (1990).

and overruled the precedent on which the lower courts had relied. The Court, therefore, properly reversed. The apparent paradox disappears when we distinguish between the law as it was at the time the district court acted and the law as it was when the Supreme Court reached its decision. At the latter time, the lower courts' decisions, though correct when rendered, "rest[ed]," as *Agostini* relates, "upon a legal principle that [could] no longer be sustained"[495] by the time the Court acted.

Or consider *Rodriguez de Quijas*, the case I have taken to exemplify the other side of *Agostini*'s paradox. In that case, the Fifth Circuit refused to follow *Wilko*, the directly controlling Supreme Court precedent. The Fifth Circuit's decision was therefore legally incorrect when rendered, because *Wilko* was then still the governing law. But when the Court overruled *Wilko* and changed the law, the Fifth Circuit's judgment—though not its method of reaching that judgment—became legally correct. On that basis, the Supreme Court affirmed the judgment. Here, too, the paradox dissolves when we distinguish between the times at which the lower court and Supreme Court acted, and when we consider that the Supreme Court changed the law with its overruling decision.

This strategy for escaping the paradox, however, is not available in *Agostini*. The reason is *Agostini*'s Rule 60(b)(5) context. In order to grant relief under that rule, *Agostini* must profess merely to recognize prior changes in the law, not itself to effect legal change. Thus while *Agostini*, like *Adarand*, overrules precedents on which the lower courts properly relied, its theory is that the law had changed no later than June 1993, when *Zobrest* was decided. And that means that in *Agostini*, unlike *Adarand*, the relevant legal change already had occurred before the lower courts' decisions in 1996. Thus, no change in the law post-dating the lower courts' decisions is available to extricate *Agostini* from the paradox. The Court needs some other theory to explain how the paradox may be resolved.

The theory the Court would have to articulate is the following. *Witters* and *Zobrest*, particularly *Zobrest*, changed the law post-*Aguilar* to establish the principles *Agostini* calls "current law."[496] These principles were thus in place from the date of *Zobrest* forward—from June 18, 1993 to the present. The Court's confirmation of those principles in *Agostini* does not, on *Agostini*'s story, work a change in the law, and in that sense *Agostini* is unlike *Adarand* and *Rodriguez de Quijas*. But still, the Court could argue, from the perspective of those principles, the lower courts' adherence to *Ball*

495. Agostini v. Felton, 117 S. Ct. 1997, 2018 (1997).

496. *Id.* at 2012; *see also id.* at 2016 (referring to the "criteria we currently use to evaluate whether government aid has the effect of advancing religion"); *id.* at 2017 (referring to "our current understanding of the Establishment Clause").

and *Aguilar*, although justified at the time the courts acted, "rest[ed] upon . . . legal principle[s] that can no longer be sustained."[497] Accordingly, the Court reverses the lower courts' decisions as inconsistent with current law, just as the Court determined in *Adarand* and *Rodriguez de Quijas*. And accordingly, the paradox disappears through a distinction between the different rules of law that governed at the relevant times of decision.

This solution to the paradox, however, exacts a price. Although from the point of view of the Supreme Court, the "current law" announced in *Zobrest* was in place from June 1993 on, it was in place only for the Supreme Court's consideration. The Court, under *Rodriguez de Quijas*, forbids the lower courts from declaring that *Aguilar* has been overruled until the Supreme Court has said so expressly. Thus, for district courts and courts of appeals, the governing law was not the law *Agostini* deems "current," but still *Aguilar*—from the day *Aguilar* was decided until the Court's June 1997 decision in *Agostini*.

The effect of this theory is an extraordinary doubling of the law. For the four years between *Zobrest* and *Agostini*, two distinct bodies of valid, binding law coexisted—one in the lower federal courts (and presumably state courts as well), and a contrary body of law in the Supreme Court. During this four-year period, the principles confirmed in *Agostini* were the law from the perspective of the Supreme Court. But at the same time, *Aguilar* was the law in every other court. From the perspective of the Supreme Court, *Witters* and *Zobrest* worked significant changes on the law and bound the Supreme Court to confirm that *Ball* and *Aguilar* were no longer good law. From the perspective of the lower courts, however, *Witters* and *Zobrest* worked no such changes, and their binding force could not overcome the force of *Ball* and *Aguilar*. Only the Court's decision in *Agostini*, the Court's theory would have it, reconciled these two contradictory bodies of law that held sway at the different levels of the judicial hierarchy.

And for that four-year period between *Zobrest* and *Agostini*, what principles governed those subject to the law—school boards, parent groups, teachers, and school children? The Court might like to answer that even before its *Agostini* decision, its law was supreme. From the point of view of the parties, however, *Ball* and *Aguilar* were, at the same time, still binding law, unless and until the Court was willing, in its discretionary exercise of certiorari jurisdiction, to take the *Agostini* case and render the decision it eventually rendered. If the Court, for whatever reasons, had denied certiorari or otherwise denied relief in *Agostini*, the parties would have remained

497. *Id.* at 2018.

subject to the principles of *Ball* and *Aguilar*, even if those cases were no longer good law from the perspective of the Supreme Court. Only the Supreme Court itself—not other courts, and not the parties—could see the *Agostini* theory as binding law before its announcement in *Agostini*.

*Agostini* thus resolves the paradox of reversing a legally correct decision, but only by transposing the paradox into a contradiction between two bodies of simultaneously valid, but opposed, legal doctrine. In so doing, the Court seems to join hands with the critical legal studies movement.[498]

Further, the Court's attempted resolution of the paradox presents a normatively unattractive conception of adjudication and constitutional change. In *Agostini*, the Court professes not to change the law but merely to apply it. The Court locates the change in Establishment Clause law in two prior decisions that, for their part, say nothing about changing the law. The Court, then, changes the law, but in none of its opinions does the Court ever assume present responsibility for the change. In *Agostini*, we are told, the change was the work of past Courts. In *Zobrest* and *Witters*, the putative law-changing decisions, we see not even a hint that the Court saw itself as presently changing the law, and accordingly, we encounter no explanation of the reasons for change. And in *Kiryas Joel*—the only pre-*Agostini* decision that addressed the question whether *Ball* and *Aguilar* should be overruled—the change is projected into the future for some later Court to effect.[499] *Kiryas Joel*'s call to future Courts is ironic after *Agostini* because on the Court's theory, the law already had changed with *Zobrest*—before *Kiryas Joel* was decided. Thus even the Supreme Court seemed unable to see that the law had changed before *Agostini*.

The inevitable consequence of the Court's strategy is its failure to provide adequate reasons for transforming Establishment Clause effects doctrine. *Witters* and *Zobrest*, as decisions that still move in *Ball*'s orbit, suggest no such reasons. And *Agostini*, which attributes the change in the law to decisions already made in *Witters* and *Zobrest*, can offer only the reasons explicit or implicit in those cases. As a result, the *Agostini* opinion is a kind of ventriloquism, in which the Court attempts to project reasons for changing the law into the silent *Witters* and *Zobrest* opinions. The more justification *Agostini* purports to find in *Witters* and *Zobrest*, the less persuasive its reading of those cases becomes. And in that same measure, the *Agostini* opinion becomes less convincing. The Court in *Agostini* must either develop an independent theory of the Establishment Clause—and in

498. *Cf.* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 258 (1987) ("[I]t is impossible to imagine any central or local legal institutions advocating a coherent, noncontradictory body of basic rules." (emphasis omitted)).

499. *See supra* notes 266–270 and accompanying text (describing the *Kiryas Joel* opinions).

that event, it would become evident that *Agostini* itself has changed the law—or the Court must attribute, unpersuasively, such a theory to *Witters* and *Zobrest*. Neither strategy can succeed.

Finally, and importantly, the Court's selection of *Agostini* as its *Aguilar*-overruling vehicle sharply limited the available options in the Court's law-reform strategy. If the Court had chosen to reconsider *Aguilar* in a case outside the Rule 60(b)(5) context, it could have decided whether to retain the *Lemon* test, or instead to overrule it and adopt one of the other Establishment Clause standards that the members of the *Agostini* majority had proposed. But the cases on which *Agostini* relies to establish the principles of "current law"—*Witters* and *Zobrest*—are modest decisions that operate within the *Lemon* framework.[500] The consequence of this strategy is to freeze, as "current law," a version of the *Lemon* test that all members of the *Agostini* majority had criticized in earlier cases.[501] Even if the *Agostini* majority could not reach agreement on a particular *Lemon*-replacing test, still, the reaffirmation of even a revised version of *Lemon* had to be difficult for those five Justices to swallow—difficult, particularly, for Justice Scalia, who in an opinion joined by the Chief Justice and Justice Thomas had vowed never again to join an opinion that applied the *Lemon* test.[502] And it leaves readers wondering what the fuss about *Lemon* was, if that case's sharpest critics were willing, without a word of protest, to enshrine *Lemon*, even a revised version of *Lemon*, in "current law." To be sure, the Court might decide in the next case that *Agostini*'s revised effects criteria, or its purpose inquiry, or both, are no longer "current." But that determination would require the Court to overrule *Agostini*. The more direct course to

500. *Witters* applies the three-part *Lemon* test expressly. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 485–89 (1986). And *Zobrest*, as argued above, works within the categories established for the *Lemon* test—even if the Court cites *Lemon* itself only sparingly. *See generally* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

501. *See supra* notes 311–313 and accompanying text. The effects standard the Court adopts, *see supra* notes 350–357 and accompanying text, is more lenient than the one applied in *Ball* and *Aguilar*. One significant difference is that the test modified the "risk analysis" of *Ball* and *Aguilar*—that is, the Court's prior willingness to invalidate a program based upon a "substantial risk," not necessarily documented in the record, that the program will be turned toward religious indoctrination. (I borrow the term "risk analysis" from Greene, *supra* note 199, at 21.)

502. "I will decline to apply *Lemon*—whether it validates or invalidates the government action in question." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399–400 (1993) (Scalia, J., concurring). While *Agostini* modifies the *Lemon* effects criteria, it retains the purpose and effect inquiries, asking under both, as in *Lemon* itself, whether government has advanced or inhibited religion. *See supra* notes 311–312 and accompanying text. And the purpose part of the test—which Scalia rejected in *Edwards v. Aguillard*, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting)—remains, *Agostini* says, "largely unchanged." *Agostini*, 117 S. Ct. at 2010.

overruling or modifying *Lemon* would have been for the Court to have passed on *Agostini* and to face the issue in a less problematic case.

All of the difficulties I have identified in the *Agostini* opinion arise, at least in part, from the Court's decision to reconsider *Aguilar* within the Rule 60(b)(5) context. That context forces the Court—if it is to grant relief—to misread *Ball* and *Aguilar*, overread *Witters* and *Zobrest*, posit coexisting but contrary bodies of law post-*Zobrest* and pre-*Aguilar*, wrongly disavow responsibility for changing the law, and fail to present adequate reasons for the change in the law *Agostini* effects. The better course would have been for the Court to wait for another case, as Justice Ginsburg's dissent recommends[503]—a case that did not involve the complications that the Rule 60(b)(5) context creates. In such a case, the Court could have decided, on the basis of an independent and fully developed theory of the Establishment Clause, whether to overrule *Ball* and *Aguilar*.

The Court, however, did not follow this better course. But in what follows, I suggest that the Court could have avoided at least some of *Agostini*'s difficulties, even within that case's Rule 60(b)(5) context.

## C. Alternate Routes

One weakness in the Court's *Agostini* opinion is the implausibility of its argument that *Witters* and *Zobrest* changed the law. The Court, it seems, might have been able to avoid this difficulty by declaring, instead, that the various *Aguilar*-repudiating statements in *Kiryas Joel* changed the law, or at least reflected a change in the law. *Kiryas Joel*, after all, was the decision prompting the filing of the Rule 60(b)(5) motion in the first place, and the moving parties relied most heavily on that decision in their arguments to the district court.[504] Further, *Kiryas Joel* was the only pre-*Agostini* case in which five Justices criticized *Aguilar* and—with differing degrees of directness—called for *Aguilar*'s overruling.[505] While, as *Agostini* notes, the issue of *Aguilar*'s overruling was not directly presented in *Kiryas Joel*, still, the Justices' attention was focused on *Aguilar* and its consequences: the legislative scheme declared unconstitutional originated as a response to *Aguilar*. Further, if the Court had relied on *Kiryas Joel* to find the pre-*Agostini* change in the law, *Agostini*'s paradox would have disappeared. On that theory, the law would have changed in 1994, before the lower courts' 1996 decisions, and it would have changed in all courts. Accordingly, the lower courts

503. *See Agostini*, 117 S. Ct. at 2028 (Ginsburg, J., dissenting). On the issue whether the Court could have encountered such a case, see *supra* notes 314–323 and accompanying text.

504. *See supra* note 291 and accompanying text.

505. *See supra* notes 266–270 and accompanying text.

would have erred in ignoring *Kiryas Joel*, and their decisions properly could have been reversed.

But although the Court is willing enough to find a repudiation of *Aguilar* through creative readings of other post-*Aguilar* precedents, elevating the *Kiryas Joel* statements to the status of a law-changing decision apparently would be simply too much. None of the anti-*Aguilar* statements appeared in an opinion for the Court, and finding them to change the law would be too frontal an assault on the fundamental distinction between holding and dictum. Piecing together the various separate *Kiryas Joel* opinions to find a change in law arguably would treat the Court as an assemblage of individual Justices whose noses are to be counted, rather than a collective body that renders collective judgments.[506] Nose-counting, or at least vote-counting, is in some ways part of normal judicial practice: When the Court is not unanimous, it determines which view has prevailed by counting votes.[507] But still, it may be more objectionable to find the Court to have overruled one of its own precedents by aggregating opinions, none of which was an opinion for the Court. And further, relying on *Kiryas Joel* as the law-changing decision seems simply inconsistent with the language of the opinions filed in that case—none of which suggest that any Justice saw *Kiryas Joel* as itself changing Establishment Clause law in a way that could help the New York City Board of Education.[508]

For some or all of these reasons, even the lawyers challenging *Aguilar* in *Agostini* did not argue to the Supreme Court that *Kiryas Joel* had changed the law. *Kiryas Joel* had done its work for them earlier, operating as a signal to the lower courts that the Supreme Court would be receptive to a petition calling for *Aguilar*'s overruling.[509] The arguments presented to the Court referred to *Kiryas Joel* as the Court's "invitation" to seek *Aguilar*'s

506. It would be ironic confirmation of the dictum often attributed to Justice Brennan: "Five votes can do anything around here." BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 6 (1996); *cf.* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 682–84 (1995) (describing the idea that a multimembet court is the sum of its individual members as inconsistent with the rule of law).

507. And in cases without a majority opinion, one counts the number of Justices who subscribed to particular results. In cases in which the Court is especially splinteted (the 4–1–4 split is the classic scenario), different methods of aggregation can produce different interpretations of the case's holding. *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 18–24 (1993); David Post & Steven C. Salop, *Rowing Against the* Tidewater: A *Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 750–58 (1992).

508. *See supra* notes 266–270 and accompanying text (discussing the separate opinions filed in *Kiryas Joel*).

509. This strategy seems to have worked. The disttict court's opinion describes the Supreme Coutt's interest in overruling *Aguilar* and goes on to present the *Agostini* case as the ideal vehicle for such a decision—thus giving the case "special handling" treatment on its way up to the Court.

overruling,[510] not as a decision that, in effect, already had accomplished that result.[511] They suggested, further, that having invited the petition, the Court could not now withdraw that invitation in *Agostini*, when, as the district court had put it, there could "scarcely be a more appropriate vehicle"[512] for overruling *Aguilar*.[513] But the primary focus of these arguments was the contention that other post-*Aguilar* cases, particularly *Witters* and *Zobrest*, had changed the law.

Another and better strategy the Court could have followed would have been to eliminate, or at least to take a relaxed view of, the restrictions on lower courts that *Rodriguez de Quijas* imposes. Under *Rodriguez de Quijas*, lower courts must follow a Supreme Court precedent that "directly controls," even if it is undermined by later authority.[514] The Supreme Court, on this theory, has a peculiar interpretive privilege or, in the Court's term, "prerogative." Only the Supreme Court, in the situations *Rodriguez de Quijas* posits, may survey the entire body of Court precedent as a body of

510. *See, e.g.*, Petition for a Writ of Certiorari at 3, Agostini v. Felton, 117 S. Ct. 1997 (1997) (No. 96-552) (stating that "five Members of the Court have expressly called for *Aguilar*'s overruling or invited its reconsideration" and citing *Kiryas Joel*); Brief for Petitioners Rachel Agostini et al. at 3, *Agostini* (Nos. 96-552, 96-553) (same); Petition for a Writ of Certiorari at 12, *Agostini* (No. 96-552) ("This petition is a direct response to the invitation of five Justices two years ago in [*Kiryas Joel*]."); *id.* at 13 ("[A] majority of the Court has invited reconsideration of *Aguilar* in an appropriate case."); Brief for Petitioners Rachel Agostini et al. at 14–15, *Agostini* (Nos. 96-552 & 96-553) ("A majority of this Court . . . invited a request to reconsider *Aguilar* in a proper case."); Reply Brief for Petitioners Rachel Agostini et al. at 4, *Agostini* (Nos. 96-552, 96-553) (stating that in *Kiryas Joel*, "a majority of the Members of this Court . . . explicitly criticized or questioned *Aguilar* and at least implicitly invited a request for its reconsideration").

511. *See* Reply Brief for the Secretaty of Education at 2, *Agostini* (Nos. 96-552, 96-553) ("*Aguilar* has not been overruled, and . . . *Kiryas Joel* itself was not a 'change in the law' warranting a grant of relief from the injunction by the district court; the lower courts were obliged to deny relief . . . since they were bound . . . by this Court's directly controlling precedent in *Aguilar*."); Reply Brief for Petitioners Rachel Agostini et al. at 4, *Agostini* (Nos. 96-552, 96-553) ("Contrary to respondents' contention, petitioners do not maintain that these individual expressions of opinion [in *Kiryas Joel*] themselves constituted a change in law."); *see also* Brief for Petitioners Chancellor and Board of Education of the City of New York at 24, *Agostini* (Nos. 96-552, 96-553) (noting that in *Kiryas Joel*, "five members of the Court explicitly stated their wish to reconsider *Aguilar*"); Brief for the Secretaty of Education at 35, *Agostini* (Nos. 96-552, 96-553) (indicating that "five Justices expressly criticized *Aguilar* as inconsistent with the Court's Establishment Clause jurisprudence").

512. Felton v. United States Dep't of Educ., No. 78-CV-1750 (E.D.N.Y May 20, 1996) (unpublished memorandum and order), *reprinted in* Petition for a Writ of Certiorari, Appendix at 15, *Agostini* (No. 96-552).

513. *See* Reply Brief for Petitioners Rachel Agostini et al. at 6–7, *Agostini* (Nos. 96-552, 96-553) ("It advances no institutional interest for the Court to issue decisions that undermine *Aguilar*, for a majority of the Justices to invite reconsideration of the decision, and for the Court then to turn a deaf ear to the affected parties who seek the reconsideration that has been invited.").

514. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

principle and determine whether later precedents have so undermined an earlier precedent as to have changed the law. Lower courts, by contrast, are bound by a rule of specificity or local priority,[515] as well as one of hierarchy: A command from above that is directly on point controls, whether or not the Court's subsequent cases are best read as countermanding the earlier order.

Rejecting or relaxing the *Rodriguez de Quijas* principle still would have left all the problems associated with *Agostini*'s use of precedent. But at least it would have allowed the Court to avoid the difficulties that *Agostini*'s paradox creates. Relaxing *Rodriguez de Quijas*'s constraint would mean that the lower courts could have engaged in the same process of interpretation the Court undertook in *Agostini*—reading *Aguilar* against the body of more recent cases, and recognizing (by accepting the Court's theory) that *Witters* and *Zobrest* had changed the law. If the Court in *Agostini* had allowed the lower courts this power, then the Court unproblematically could have reversed, as erroneous, the lower courts' decisions to follow *Aguilar* rather than the law-changing decisions in *Witters* and *Zobrest*. The Court would have had no need to suppose that two contradictory bodies of law coexisted between *Zobrest* and *Agostini*—*Aguilar* in the lower courts and post-*Aguilar* law in the Supreme Court—and it would have escaped the paradox of reversing a correct judgment.

Despite the benefits this course would have had for the Court's *Agostini* opinion, the Court's decision to reject it is unsurprising. The Court remains firmly committed to the strictures for lower-court interpretation it laid down in *Rodriguez de Quijas*. Both the majority and the dissent in that case stated that the lower court had erred in declaring a Supreme Court precedent obsolescent. If anything, the dissent in that case was more insistent on the point than the majority, describing the court of appeals as having engaged in "an indefensible brand of judicial activism."[516] The Court did not offer justifications for the principle it announced in *Rodriguez de Quijas*. But a number of reasons for the Court's commitment to that principle are imaginable.

Doubtless one reason is the fear that "rogue" district judges otherwise might disregard a Supreme Court precedent simply because they, for whatever reasons, find it incorrect or unattractive.[517] This concern might be

515. On the notion of "local priority" in judicial interpretation, see RONALD DWORKIN, LAW'S EMPIRE 250–54 (1986).

516. *Rodriguez de Quijas*, 490 U.S. at 486 (Stevens, J., dissenting).

517. The classic example, perhaps, is Judge William Brevard Hand's decision in *Jaffree v. Board of School Commissioners*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983), holding that the Establishment Clause does not apply to the states.

good reason to oppose, for example, Michael Stokes Paulsen's theory of "underruling," under which lower courts should refuse to enforce Supreme Court precedents that are, in the lower court's conscientious independent judgment, "clearly outside the range of allowable judicial interpretation of the Constitution."[518] But relaxing *Rodriguez de Quijas*'s strictures would not necessarily give such free rein to lower courts. The proposal I am considering is narrower in two respects than Paulsen's theory of "underruling." First, *Rodriguez de Quijas* itself deals with a sharply limited class of cases—those in which later Supreme Court authority undermines, without expressly overruling, an earlier and directly relevant precedent. *Rodriguez de Quijas* does not concern the ordinary case, in which the Supreme Court has issued a clear command, or at least has not issued later commands that undermine, without expressly rescinding, an earlier and clearly binding instruction. And under the modification of *Rodriguez de Quijas* I am suggesting, the question for the district judge is not whether she, in an independent exercise of her judgment, would agree with the Supreme Court's directly controlling precedent, or even find it a permissible interpretation of the law. The question would be only whether the Supreme Court *itself* has so undermined an earlier precedent that the better reading is to see that precedent as implicitly overruled by the Court's later decisions.

Presenting the question this way addresses a second possible defense of *Rodriguez de Quijas*: that the interpretive principle announced in that case follows necessarily from a distinction between superior and inferior courts. The proposal I am considering—under which lower courts would have the authority to determine whether the Court itself has overruled implicitly an otherwise controlling precedent—is consistent with the idea that inferior courts must follow the Supreme Court's instruction. In order to follow an instruction, one must interpret it first. And it does not follow from the nature of taking instruction, or the nature of interpretation, that the earlier and more specific command should control, when later instructions countermand it or make it senseless. In these cases, after all, to follow the more specific command is at the same time to ignore the more recent instructions. Deciding that the Supreme Court's own cases implicitly have

518. Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 87 (1989) [hereinafter Paulsen, *Accusing Justice*]; *see also* Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 386 & n.3 (1994). Paulsen suggests that "the case for 'underruling' is especially strong where it is anticipated that the Supreme Court may be prepared to reconsider a constitutional holding." Paulsen, *Accusing Justice*, *supra*, at 87. He notes, however, that the rationale of his proposal is not necessarily limited to such situations. *See id.* at 86 n.142.

overruled an earlier precedent defers to, rather than defies, the Court's authority.[519]

Another reason behind *Rodriguez de Quijas* might be the Court's desire to ensure that inferior tribunals decide cases by interpreting and following the Court's decisions, rather than by predicting whether the Court, in some future decision, will overrule one of its own precedents. The "predictive" mode of lower-court decision making, it may be argued, is inconsistent with the rule of law—at least when the predictions are based upon factors such as changes in the Court's personnel, the Justices' extrajudicial statements, or estimations of particular Justices' ideological views.[520] On this theory, lower courts should refrain from predictive, "anticipatory overruling" of Supreme Court precedents, "leaving to th[e] Court the prerogative of overruling its own decisions."[521]

One response to this defense of *Rodriguez de Quijas* is to note that the Court has not always disapproved of lower courts' anticipatory overruling, even when it has been based on factors such as changes in the Court's personnel. The most famous example is the Court's celebrated *West Virginia State Board of Education v. Barnette*[522] decision, invalidating a compulsory flag-salute in public schools, and overruling the Court's contrary decision just three years before in *Minersville School District v. Gobitis*.[523] The Court's *Barnette* opinion affirmed, without critical comment, a lower-court decision that had refused to apply *Gobitis*, based in part on a correct prediction that the two Justices who had joined the Court since *Gobitis* would cast deciding

519. On the question whether a general policy tolerating outright defiance of Supreme Court authority could be justified, see Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 851 (1993) ("It is difficult indeed to envision an institutional judiciary that allowed its underlings in effect to ignore the decisions of those at the top.").

520. This is Michael Dorf's conclusion. *See* Dorf, *supra* note 506, at 655 (concluding that "as a general matter, the prediction approach undermines the rule of law," notwithstanding the existence of some "marginal benefits"); *cf.* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 6 (1994) (concluding that a predictive approach by lower courts is justified in some cases). On the sources available to a purely predictive approach, other than written judicial opinions, see Dorf, *supra* note 506, at 663–64 (mentioning the Justices' "non-judicial writings and speeches" and their "general ideological commitments"). *See also* Caminker, *supra*, at 17–19 (mentioning dicta, "law review articles, confirmation-hearing testimony, and public speeches," as well as "particular Justices' general ideological commitments or proclivities"); *cf.* Dorf, *supra* note 506, at 652 (describing pro se petitions filed in the Supreme Court, seeking rehearing of denial of certiorari, and invoking as the required "intervening circumstance" Justice Thomas's ascension to the Court).

521. *Rodriguez de Quijas*, 490 U.S. at 484.

522. 319 U.S. 624 (1943).

523. 310 U.S. 586 (1940).

votes to overrule.[524] Decisions like *Barnette* make it difficult to see the predictive method of lower-court decision making, even when used for anticipatory overruling, as necessarily inconsistent with the rule of law.

But in any event, the modification of *Rodriguez de Quijas* I am considering does not depend upon approval of predictive lower-court decision making or anticipatory overruling. On the proposal I am considering, lower courts need not predict what the Supreme Court will do, nor need they "overrule" Supreme Court decisions anticipatorily. Instead, they need only interpret and follow existing Court decisions—giving no dispositive preference to the earlier precedent simply because of its local priority. This method of interpretation will not take the same form as a purely predictive method, nor will it necessarily produce the same results.

Commentators have recognized this distinction between predictive anticipatory overruling and a lower court's recognition that the Supreme Court itself has overruled implicitly one of its earlier decisions. Evan Caminker, writing before *Agostini*, reads *Rodriguez de Quijas* only to "admonish[] inferior courts not to engage in anticipatory overruling."[525] But a lower court's determination that "newer precedents implicitly overrule the old," he recognizes, does not qualify as anticipatory overruling.[526] Further, Caminker argues, so far as the lower court reaches that conclusion by "interpreting binding precedents," rather than by anticipating a future Supreme Court decision to overrule, the court has not engaged in predictive decision making.[527] Michael Dorf, too, distinguishes between

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524. The three-judge district court noted that "[o]f the seven justices now members of the Supreme Court who participated in [*Gobitis*], four have given public expression to the view that it is unsound . . . ." Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251, 253 (S.D. W. Va. 1942), *aff'd* 319 U.S. at 624. What the district court did not say expressly is that "Justices Rutledge and Jackson, new appointees to the Court, were widely thought to be uncommitted to *Gobitis* as a result of their opinions in other cases." Levinson, *supra* note 519, at 851 n.29. This consideration, though, seems implicit in the district court's calculations, which total only four votes against *Gobitis*, but indicate that two new Justices would be voting. *See* Caminker, *supra* note 520, at 2 (classifying the district court's decision in *Barnette* as an example of a decision refusing to apply a Supreme Court precedent, based on a prediction the Supreme Court would overrule); Dorf, *supra* note 506, at 661–63 (same).

525. Caminker, *supra* note 520, at 20.

526. *Id.* at 20 n.73; *see also id.* at 20. Since Caminker wrote these words, *Agostini* has made clear that the Court sees its "implicitly overrule[d]" precedents as covered by the *Rodriguez de Quijas* principle, not as exceptions. *See* Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997). But Caminker may be right that in *Agostini* the Court could have drawn the distinction he suggests by interpreting *Rodriguez de Quijas* restrictively. *See infra* notes 555–556 and accompanying text.

527. *See* Caminker, *supra* note 520, at 5–7 (distinguishing between the precedent and proxy (or, predictive) methods of inferior-court decision making); *see also id.* at 20 n.73 (noting that if the court concludes from examination of superior-court precedent that later decisions have overruled an earlier precedent, "the court can fairly be characterized as following the precedent model").

decisions in which lower courts base their refusal to enforce a Supreme Court precedent on "predictions" of "individual Justices' views"—which Dorf disapproves as undermining the rule of law[528]—and decisions in which lower courts conclude, based on "conventional legal reasoning" concerning "impersonal legal materials," that the Supreme Court already has overruled its own precedent sub silentio. The "troubling" aspect of *Rodriguez de Quijas*, Dorf says, is that it conflates the two kinds of decision and disapproves of both.[529] Caminker and Dorf thus differently interpret both *Rodriguez de Quijas*'s scope and the legitimacy of lower courts' predictive decision making. But they agree that concerns about anticipatory overruling and predictive decision making should not prevent lower courts from determining that the Supreme Court itself already has overruled a precedent implicitly.

The terms "overruling" and "underruling," sometimes used to include any lower court decision that refuses to enforce a Supreme Court precedent, obscure one further limitation on the present theory. A lower court's determination that the Supreme Court has abandoned or implicitly overruled an earlier precedent would not have the same legal impact as a similar decision by the Supreme Court itself. The lower court's decision in such a case would have no more authority than any other lower court decision—that is, it would not bind higher courts in the same jurisdiction, nor would it bind courts from other jurisdictions. Further, if the decision were rendered by a federal district court, it would be subject to a contrary determination by a court of appeals panel, and that decision itself would be subject to possible en banc review. Similar checks on lower-court interpretation are in place in the state courts. These layers of pre–Supreme Court review likely would insulate the Court from most "rogue" decisions—decisions that are, in any event, always possible, with or without *Rodriguez de Quijas*'s teaching.[530] And finally, of course, the Supreme Court would have in these matters the last and decisive word.[531]

Speaking last and decisively, however, is apparently not enough for the Court. *Rodriguez de Quijas*'s insistence on the Court's special "prerogative" may rest on three additional considerations. First, the Court may believe

528. *See* Dorf, *supra* note 506, at 655.

529. *See id.* at 676–77 n.87. As Dorf puts it, *Rodriguez de Quijas* "appears to confuse the power to declare a precedent dead with the power to kill it." *Id.*

530. I would expect, though I cannot prove the point, that courts of appeals would be reluctant to declare Supreme Court precedents implicitly overruled.

531. Those who speak of lower courts "overruling" and "underruling" the Supreme Court are of course aware that the lower court's judgment has effects different from, and less far-reaching than, a substantively similar judgment by the Supreme Court. The terms "overruling" and "underruling," however, seem to me to efface these differences unnecessarily.

that reasons of judicial economy require limits on the lower courts' interpretive freedom. Second, the Court may believe that line-drawing problems counsel against recognizing even a small category of cases in which lower courts permissibly could refuse to enforce a Supreme Court precedent. Third, the Court likely prefers to retain maximum control over the timing of legal change and maximum control over its own docket. Allowing lower courts the opportunity to force a decision whether to overrule a precedent arguably would interfere with the Court's power to manage the process of legal change.[532]

The judicial economy point is not wholly mistaken. Admittedly, allowing lower courts to determine that a Supreme Court precedent is no longer applicable might marginally increase the likelihood or scope of litigation in some cases. The reasons why are as follows. Under *Rodriguez de Quijas*, the only chance of ultimate victory for the party seeking an overruling decision lies in the Supreme Court. This still would be true if *Rodriguez de Quijas*'s constraints were relaxed, because the losing party likely would seek Supreme Court review, and the Court likely would grant it, in most cases in which a federal court of appeals or state supreme court refused to apply a Supreme Court precedent. But the party seeking an overruling decision would have a better chance of getting Supreme Court review, and perhaps ultimately victory, if the lower courts could force the Court to take the case by declining to apply one of the Court's precedents. This improved chance of success might make parties more likely to challenge embattled Supreme Court precedents. Some suits likely would be filed that would not have been filed under *Rodriguez de Quijas*, and in some cases that would have been filed anyway, the additional issue whether to follow the Court's precedent would marginally burden the courts at each level.

Still, given the relatively small number of cases in which one can argue credibly that the Supreme Court implicitly has overruled its own precedent, the total effect of this burden likely would be small. And it would be at least partly counterbalanced by speedier Supreme Court clarification of its own messy precedent. Considerations of judicial economy,

532. One might also suppose an additional argument—that the *Rodriguez de Quijas* rule is justified because it prevents the injustice of delayed victory in cases in which the Supreme Court reaffirms its embattled precedent. Whether or not this argument supports a general requirement that lower courts follow Supreme Court precedent, *see* Caminker, *supra* note 1, at 843–45 (arguing that there should be an additional "normative justification"), the argument is weaker here. If the Supreme Court arguably has overruled a precedent implicitly, then the law as the Supreme Court would apply it does not give the party relying on that precedent a clear entitlement to victory.

then, while not nonexistent, do not seem to me powerful support for *Rodriguez de Quijas*.

The Court might believe that judicial economy concerns are heightened by what I supposed as a second argument for *Rodriguez de Quijas*—the problem of drawing lines that will limit the number of cases in which lower courts could deem Supreme Court precedents obsolescent. This second argument is, of course, partly correct. Any distinction between questionable and implicitly overruled precedents will be contestable, and thus we can imagine a category of cases in which parties could make, and courts might accept, nonfrivolous but nonmeritorious arguments that the Court implicitly has overruled its own precedent. This line-drawing problem likely would be serious for a proposal authorizing lower courts not to enforce precedents with which they strongly disagreed.[533] But the present proposal is much more tightly drawn: The lower court must find that the Supreme Court itself has abandoned an earlier precedent. Thus even if the rule would be hazy at the margins, the number of cases in which nonfrivolous arguments could be made is relatively small.

A more weighty argument in favor of *Rodriguez de Quijas*, I think, concerns the Court's interest in managing the process and timing of legal change, by maintaining full control over its own docket. The Court may have determined to overrule one of its precedents, but only in the right sort of case. It may be interested, for example, in taking a case with a particular kind of fact-situation, in ensuring that both sides are represented by good counsel, in avoiding procedural quirks in the case under review, or in taking a case in which the issue has adequately "percolated" in lower courts. Such considerations, important in any decision to grant certiorari,[534] are perhaps more important in cases in which the Court is considering whether to announce the overruling of one of its own precedents. Yet the Court would feel strong pressure to take any case in which the lower court held a directly relevant Court precedent unenforceable in light of more recent Court authority. Relaxing the constraints of *Rodriguez de Quijas*, then, arguably would interfere with the Court's management of legal change.

These considerations are genuine. But first, even if the Court would feel pressure to take cases that held a Supreme Court precedent unenforceable, the Court always has the option of denying review if it deems the

533. *Cf.* Caminker, *supra* note 1, at 860–65 (suggesting that line-drawing concerns counsel against allowing lower courts to refuse enforcement of superior court precedents "whenever they believed those precedents to be 'outside the range of allowable judicial interpretation,' or 'lawless,' or 'clearly wrong,' or 'not fully informed,'" *id.* at 863–64).

534. *See, e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 230–36 (1991).

particular case an unsuitable "vehicle." Denial of certiorari is not a judgment on the merits, and thus the possibility of addressing the issue in a better case would remain. To be sure, the result of denying review would be to let stand a decision that might have been wrong in refusing enforcement of an embattled Supreme Court precedent. Further, denial of review likely would leave the law uncertain and nonuniform. But the Court regularly tolerates nonuniformity when it allows conflicts among courts of appeals to "percolate,"[535] and by hypothesis, in the cases under consideration the Court's own precedent is *already* uncertain. Moreover, as to the risk that the lower court's judgment was erroneous, the Court regularly denies review of decisions that arguably misapply the Court's precedents. Perhaps the misapplication is more serious when it is an incorrect determination that one of the Court's precedents is no longer good law. But most of this idea's force comes from a sense that the lower court has committed an act of disobedience or defiance, and for reasons suggested above, this is not necessarily so. If the lower court's decision is rendered skillfully and in good faith, it could better be characterized as an act of respecting the Court's precedents—even if the Court later determined that the lower court's respect was misplaced.

Further, the Court perhaps *should* feel obliged to act, and act relatively promptly, when its decisions are in such disarray that one of their number is arguably nullified by later authority. Empowering lower courts to make such a determination would exercise pressure on the Court to clarify and rationalize its untidy precedent. *Rodriguez de Quijas* is acutely concerned with the disciplinary power the Supreme Court wields over lower courts. But it ignores the possibility that disciplinary pressures from the bottom up might be beneficial—at least when the Court cannot claim to have excelled in its managerial role.[536]

Besides the disciplinary and rationalizing pressure they could create, the lower courts have another positive role in the process of legal change—that of elaborating the new legal principles the Court announces in its law-changing decisions. Consider, for the moment, the more ordinary cases

535. *See id.* at 230–34.

536. Paulsen's recommendation of a much more general practice of "underruling," *see supra* text accompanying note 518, depends in part on the premise that underruling would compel superior courts to rethink mistaken precedent. Caminker acknowledges that in some cases such "forced rethinking" might be beneficial, although as noted above, *see supra* note 533, ultimately he rejects the proposal, in part because of line-drawing problems. *See* Caminker, *supra* note 1, at 860–65. Still, Caminker has suggested elsewhere that declining to follow a decision the Court itself has "implicitly overruled" would be consistent with the idea that lower courts are to interpret and follow superior-court precedent rather than predict outcomes in supetior courts. *See* discussion *supra* notes 525–527 and accompanying text.

of Court-induced legal change, when the Court's law-changing decision does not implicitly overrule, without expressly overruling, an earlier Court precedent. In these cases—the ones that *Rodriguez de Quijas*'s interpretive principle does not address—the Court's law-changing standard may resolve the legal uncertainty that prompted the Court to grant certiorari. But at the same time, the Court's announcement of a new legal standard typically creates fresh uncertainties—uncertainties, for example, as to the precise scope and particulars of the new standard's applications. In these ordinary cases, all would concede, the lower courts have an important role in implementing and specifying the new legal standard. The Supreme Court can supervise this process of implementation and specification, by undertaking review of a decision that applies the new standard. Typically, however, the Court will stay its hand until after a number of lower courts have had a chance to address the new uncertainties. And typically, though not invariably, the Court will wait until a "certworthy" conflict has developed over implementation of the new standard—generally, a conflict between or among federal courts of appeals, or a conflict between a federal court of appeals and a state high court. In these more ordinary cases of legal change, the lower courts participate, albeit under the Supreme Court's supervision, in the process of implementing legal change.

*Rodriguez de Quijas*, however, changes this dynamic in the lower-court cases its interpretive principle covers: those in which the Court has rendered a decision that seriously undermines, without expressly overruling, an earlier precedent that "directly controls"[537] the lower court's decision. In these circumstances, *Rodriguez de Quijas* prescribes, the lower courts must follow the earlier precedent, leaving to the Supreme Court the "prerogative" of implementing further change. In the cases covered by *Rodriguez de Quijas*, then, the lower courts are ousted from their ordinary role of implementing, under the Supreme Court's supervision, the legal changes that the Court has initiated.

An example of the role that lower courts might play in implementing legal change—but for *Rodriguez de Quijas*—appears in the interaction between the Supreme Court and the lower federal courts after *Brown v. Board of Education*.[538] In *Brown*, the Court declared that the "separate but equal" standard of *Plessy v. Ferguson*[539] had "no place" in "the field of public education."[540] The Court did not, however, expressly overrule *Plessy*, nor did it discuss whether the "separate but equal" standard still might apply in

537. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).
538. 347 U.S. 483 (1954).
539. 163 U.S. 537, 551 (1896).
540. *Brown*, 347 U.S. at 495.

fields other than public education. And the *Brown* opinion specifically emphasized the special significance of education, as well as the special effect that segregation in public schools has on the "hearts and minds" of children.[541] The Court's discussion certainly undermined the *Plessy* doctrine, but the Court stopped short of declaring that "separate but equal" had no legitimate place in any aspect of public life.

The task of extending *Brown* to other public institutions and facilities fell in the first instance to the lower courts. Less than a year after *Brown* was decided, the Fourth Circuit, in *Dawson v. Mayor & City Council of Baltimore*,[542] held that city beaches and bathhouses could not be segregated, whether or not the separate facilities were equal. No sensible distinction could be maintained, the court reasoned, between recreational facilities, whose use was "entirely optional," and the system of compulsory education in which the Supreme Court had ruled segregation unlawful—at least not a distinction that favored the statute's constitutionality.[543] In so holding, *Dawson* dealt directly not with *Plessy*, but with circuit and state-court precedent that had approved segregated park facilities.[544] But because that precedent was based on *Plessy*, and because *Plessy* would control if it were still good law,[545] *Dawson* necessarily determined that *Plessy* effectively had been overruled, even beyond the context of public education that *Brown* had addressed directly. In so holding, the court violated the principle later announced in *Rodriguez de Quijas*: The court refused to enforce an otherwise binding Supreme Court precedent that had not yet been expressly overruled, citing later authority that undermined the precedent's rationale.

One year after *Dawson*, a lower court faced the question whether *any* aspect of *Plessy* had survived the Court's decision in *Brown*. The question was presented this starkly because the facts posed the narrow issue decided in *Plessy*: Could government segregate seating by race on intrastate transportation? The case was *Browder v. Gayle*,[546] and the particular challenge was to the practice of segregated seating on Montgomery, Alabama city buses.

A three-judge district court decided in *Browder* that *Plessy* was no longer good law, even in its domain of original application. The court relied both on *Dawson* and on the lower court's decision in *Barnette*. In

541. *See id.* at 492–95.
542. 220 F.2d 386, 387 (4th Cir. 1955) (per curiam).
543. *Id.*
544. *See id.* at 386–87.
545. Unless one were to read *Plessy* narrowly, and unconvincingly, as a case only about seating on intrastate railroads, rather than a decision that constitutionally underwrote an entire regime of status regulations.
546. 142 F. Supp. 707 (M.D. Ala. 1956).

both cases, the *Browder* court suggested, a Supreme Court precedent, not yet expressly overruled, was "so impaired by later decisions as no longer to furnish any reliable evidence" as to the state of the law.[547] The primary decision that "impaired" *Plessy* was, of course, *Brown*, but the court relied also on the line of Supreme Court cases disapproving instances of segregation in higher education, and a case holding that segregated seating on interstate rail transportation violated the Interstate Commerce Act.[548] *Browder* thus determined that *Plessy*, an otherwise directly controlling Supreme Court case not yet expressly overruled, had been so undermined by subsequent Supreme Court cases that it was no longer good law—even in its original domain of seating on intrastate transportation.[549] In so holding, the court did exactly what *Rodriguez de Quijas* later prohibited, even more clearly than the *Dawson* court had done.

The Court, however, summarily affirmed both *Browder*[550] and *Dawson*.[551] And on the day that it summarily affirmed *Dawson*, the Court relied on that decision to reverse summarily a Fifth Circuit decision that had permitted "separate but equal" treatment with respect to city golf courses.[552] Using only its powers of summary affirmance and summary reversal to superintend the process, the Court thus relied on the lower courts to extend *Brown*'s equality principle from public education to public facilities generally. The Court's summary affirmances gave these lower-court decisions the status of binding national precedent, while allowing the Court to remain in the background as an entire legal regime was uprooted. These lower-court decisions would not have been possible had the Court been committed to the principle *Rodriguez de Quijas* later announced.

Certainly one can argue, as Herbert Wechsler argued, that in extending *Brown*'s reach through unexplained summary affirmances the Court abdicated its responsibility to explain its decisions.[553] Or one could defend the Court's strategy of lying low after *Brown*, and relying heavily on the assistance of lower courts, as a wise preservation of its institutional capital, given the national tumult over *Brown*. However one resolves the debate over whether the Supreme Court properly exercised its management powers post-*Brown*, the point for present purposes is simply that the Court found

547. *Id.* at 716; *see also id.* at 716 n.14.
548. *See id.* at 715–16.
549. *See id.* at 716–17.
550. Gayle v. Browder, 352 U.S. 903, 903 (1956) (per curiam).
551. Mayor & City Council v. Dawson, 350 U.S. 877, 877 (1955) (per curiam).
552. *See* Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam), *vacating* 223 F.2d 93 (5th Cir. 1955).
553. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22–23 (1959).

the lower courts useful partners in implementing the legal changes initiated with *Brown*—in circumstances under which *Rodriguez de Quijas* now would require the Court to go it alone. With Wechsler, one might well suppose that the Court should have noted probable jurisdiction and heard argument in *Dawson*, *Browder*, and the other cases in which it acted summarily.[554] But even so, the Court would not have acted more properly, or more wisely, if it had required the lower courts to follow *Plessy*—leaving to the Supreme Court the question whether *Brown* should be extended beyond the sphere of public education. Nothing would have been gained by requiring the lower courts to pass the cases up to the Supreme Court for it to decide that question in the first instance.

Relaxing *Rodriguez de Quijas*'s constraints, then, would be normatively defensible. *Rodriguez de Quijas* is anomalous in its treatment of lower courts' role in legal change, and the features of the context that case covers do not sufficiently justify the anomaly. The proposal I have been considering—allowing lower courts to refuse enforcement of Supreme Court precedents that the Court has implicitly overruled—provides sufficient protection against "rogue" decisions, is consistent with rule-of-law values and adequately protects the Court's legitimate interests in managing legal change. Of course, one might well disagree with my assessment. But that would raise only a further difficulty for the Court's transformation of Establishment Clause doctrine in *Agostini*: The Court needed to follow the course I have been suggesting, if its *Agostini* opinion were to be coherent.

Suppose one accepts, as a general matter, that relaxing *Rodriguez de Quijas*'s limits on lower-court interpretation would be desirable. One further question remains: Given *Agostini*'s Rule 60(b)(5) context, could the Court have followed the strategy I am suggesting in *Agostini*? The difficulty is that, as mentioned, the Court has interpreted Rule 60(b)(5) to prohibit courts from changing the law in their own relief-granting decisions. The Court, however, would seem to offend this principle, if overruling or modifying *Rodriguez de Quijas* were part of *Agostini*'s theory. The Court, it seems, would be relying on a change in the law that its own relief-granting decision effected.

This difficulty is not insuperable. First, although in referring above to "*Rodriguez de Quijas*" I have taken the case to have the full scope *Agostini* attributes to it, a narrower reading is possible. The Court could have read *Rodriguez de Quijas* to bar only "anticipatory overruling," not a lower court's

554. *See also* New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (invalidating the practice of segregating golf courses), *aff'g* 252 F.2d 122 (5th Cir. 1958); *Holmes*, 350 U.S. at 879 (reversing summarily a lower-court decision that had approved segregation in the use of golf courses if opportunities were equal).

conclusion that the Supreme Court itself already has overruled, even if implicitly, its own decision. That, as mentioned above, was Caminker's interpretation of *Rodriguez de Quijas* before *Agostini*.[555] This interpretation of *Rodriguez de Quijas* is at least plausible, if not compelling.[556]

Further, even if the Court would have had to acknowledge modifying or overruling *Rodriguez de Quijas*, Rule 60(b)(5) would not have barred the Court from relying on its new understanding to grant relief in *Agostini*. The "change in law" that may entitle movants to Rule 60(b)(5) relief is a change in *substantive* law. As the Court put it in *Rufo v. Inmates of Suffolk County Jail*:[557] "[M]odification . . . may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent."[558] What the Court cannot do in granting Rule 60(b)(5) relief is to effect such a change in substantive law in its own relief-granting decision. But the *Rodriguez de Quijas* principle is not a substantive rule that determines the legality vel non of the parties' conduct. It speaks, instead, to the conduct of lower courts and to the allocation of power among courts in the hierarchical federal court system. Neither *Rufo*, nor the Court's other Rule 60(b)(5) cases, nor the text of Rule 60(b)(5), expressly limits the Court from effecting and relying upon these kinds of legal change in its relief-granting decision.[559]

555. *See supra* text accompanying notes 525–527; *cf. supra* text accompanying notes 528–529 (discussing Dorf's reading of *Rodriguez de Quijas* as conflating anticipatory overruling with lower-court determinations that a precedent already has been implicitly overruled and as condemning both practices).

556. Against Caminker's interpretation, the lower court in *Rodriguez de Quijas* indicated that *Wilko*, the earliet precedent, already had been "effectively overruled" by the Supreme Court and that a "'formal overruling . . . appears inevitable—or, perhaps, superfluous.'" Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1297–98 (5th Cir. 1989) (citation omitted). Yet the Supreme Court disapproved the Fifth Circuit's recognition of this implicit overruling. The argument in favor of understanding the Fifth Circuit's action as an anticipatory overruling would focus on the fact that the Supreme Court, in the case that allegedly overruled *Wilko* implicitly, in fact distinguished *Wilko*, suggesting that "*stare decisis* concerns may counsel against upsetting *Wilko*'s . . . conclusion." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 234 (1987). The Fifth Circuit, then, could not argue credibly that the Supreme Court *already* had overruled *Wilko*.

557. 502 U.S. 367 (1992).

558. *Id.* at 388.

559. Nor would overruling or modifying *Rodriguez de Quijas* in the Court's *Agostini* opinion lead to paradox. As discussed above, the paradox I identify in *Agostini* arose because of the Court's commitment to the *Rodriguez de Quijas* principle. Overruling that principle, even in a Rule 60(b)(5) case like *Agostini*, would be like the ordinary case of overruling. While the lower courts were correct to follow *Rodriguez de Quijas*'s interpretive strictures, the Court could explain, the law has changed with the Court's decision to modify or overrule that aspect of *Rodriguez de Quijas*. And from the perspective of the new, changed law, the lower courts' decisions were legally incorrect and may be reversed without paradox.

Relaxing *Rodriguez de Quijas*'s constraints, then, is normatively defensible, and it was an available option in *Agostini*. Had the Court selected that option, the cost to the Court's authority would have been minimal. Even in relaxing *Rodriguez de Quijas*'s constraints, the Court would have been instructing the lower courts to follow the Court's decisions—to recognize, as the Court says it is itself constrained to recognize, that more recent cases rendered *Aguilar* no longer good law. The Court, however, did not choose this option. It chose instead to guard its interpretive "prerogative" jealously, and to maintain its exclusive managerial control over the transformation of Establishment Clause law. The price of this decision is the incoherence I criticized above—*Agostini*'s supposition that post-*Zobrest* and pre-*Agostini*, "the law" had divided into two simultaneously valid, yet contradictory, bodies of law.

To be sure, the *Agostini* opinion still would have been implausible, even if the Court had relaxed the constraints of *Rodriguez de Quijas*. The opinion still would have rested on untenable readings of *Witters* and *Zobrest* as implicitly overruling *Ball* and *Aguilar*—readings that seem driven by the desire to reach a particular result, and to reach it as soon as possible, no matter how implausible and incoherent its opinion would have to be. My point, instead, is that if the Court had not insisted on sole power to transform the law, its *Agostini* opinion could have been implausible in only one respect rather than two. Given the choice between avoiding incoherence and maintaining maximum power, the Court opts for power.

## CONCLUSION

The criticisms of *Agostini* I have been developing do not depend upon any particular view of the underlying substantive Establishment Clause issues. I criticize not the substance of the Court's transformation of Establishment Clause law—though that, too, surely is at least contestable—but instead, the process by which the Court manages its transformation of Establishment Clause law.

In the Introduction, I said that the criteria by which I would evaluate the Court's transformation of Establishment Clause law were "effectiveness" and "legitimacy."[560] Under "effectiveness," I said, I would examine whether the Court had selected an appropriate vehicle for its law-transforming project, whether the change-favoring Justices had employed that vehicle skillfully, and whether they had realized their law-transforming ambitions. Under "legitimacy," I said, I would inquire whether the Court successfully

560. *See supra* notes 33–34 and accompanying text.

had negotiated the constraints that define its power to manage legal change, including procedural rules, as well as norms such as stare decisis issues and the requirement of reasoned explanation.

By these criteria, the Court's management of its law-transforming project in *Agostini* was a failure. The Court's first mistake—and a mistake that made the other errors in the Court's transformation strategy unavoidable—was its selection of *Agostini* as law-transforming vehicle. In any other case, the Court could have considered the full range of reasons for overruling *Ball* and *Aguilar*, and it would have been free to adopt an Establishment Clause standard that had not yet been sanctified by precedent. In *Agostini*, however, the Rule 60(b)(5) context required the Court to apply current law, not change it, and accordingly the Court was confined to the argument that precedents, post-*Aguilar* but pre-*Agostini*, "dictate" that "*Aguilar* is no longer good law."[561] This argument, I have contended, depended upon thoroughly implausible readings of the Court's precedents, and it led the Court to adopt an unclear[562] Establishment Clause standard that no member of the *Agostini* majority had defended in the long struggle over *Lemon*'s continued survival.

Further, the strategy of finding the law-changing decision in the past allowed the Court to escape present responsibility for changing the law. In *Agostini*, we are told, the Court is not presently changing the law, but merely acknowledging past changes effected in *Witters* and *Zobrest*. When we turn to *Witters* and *Zobrest*, however, we find no indication that the Court was changing the law. And when we look to *Kiryas Joel*, the decision that prompted the *Agostini* proceedings, we find the transformation of Establishment Clause law projected into the future, as the work of some later Court—even though, on the theory later announced in *Agostini*, that transformation had already occurred in *Witters* and *Zobrest*. In this constitutional shell game, the change in the law, and consequently the reasons for the change, are always somewhere else. In no case does the Court offer the sort of reasons one would expect from a decision to overrule the Court's own precedents.

The Court's *Agostini* decision, I have contended, is flawed for an additional reason. *Agostini* holds that *Aguilar* already was "no longer good law" no later than the 1993 *Zobrest* decision, and at the same time the Court insists that it alone among courts legitimately could recognize this change in the law. The consequence, I have argued, is that the Court must suppose that "the law" was really two coexisting but contradictory bodies of law, one valid from the perspective of the Supreme Court, the other valid in all

561. Agostini v. Felton, 117 S. Ct. 1997, 2003 (1997).
562. *See supra* notes 348–357 and accompanying text.

other courts. The escape from this bizarre consequence, I have contended, would have been to authorize lower courts to recognize the implicit overruling of *Aguilar* that the Court finds in *Witters* and *Zobrest*. Such a decision would not seriously have compromised the Supreme Court's authority over other courts, and it would have made the Court's treatment of the Rule 60(b)(5) issue at least coherent. But instead, the Court insisted upon full control over the transformation of Establishment Clause doctrine.

On the day he announced his retirement, Justice Marshall charged that "[p]ower, not reason, is the new currency of this Court's decisionmaking."[563] One might well doubt that this characterization is a fair assessment of the present Court's full body of work—or that, to the extent the claim is true, it would distinguish the present Court from past Courts.[564] But in *Agostini*, at least, the Court's management of legal change is long on power and short on reasons for power's exercise.

563. Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

564. The legal process thinkers leveled similar charges against the Warren Court, both as to specific decisions or lines of decisions, and as to the Court's performance more generally. For classic instances, see, for example, Wechsler, *supra* note 553, at 19 (stating that courts are "bound to function otherwise than as a naked power organ," and their decisions have "legal quality" only so far as they "rest[] on reasons with respect to all the issues in the case"); *id.* at 22–23 (criticizing the Court's reliance on per curiam decisions in post-*Brown* segregation cases); *id.* at 33–34 (suggesting that *Brown* could not have rested on its stated reasons, and finding difficulties with other reasons hypothesized to support the result); Henry Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 98 (1959) (arguing that the Court's use of case-by-case adjudication in Federal Employers' Liability Act cases "is a misuse of power"); *id.* at 98–99 (stating that the Court's tendency to offer ipse dixits rather than reasoned explanation is a misuse of judicial power); *id.* at 99 ("Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do."); *id.* at 100 (noting the Court's tendency to rely on dogmatic pronouncement rather than reason).